

## Introduction to Private Law

Against the backdrop of the predominant legal positivism, this book strives to depict private law as a complex social phenomenon interacting with human culture as a whole and its history. The author sketches the national jurisdictions belonging to the Western legal tradition, as well as the supranational trends that point towards a global law. In particular, the rise of a European law is accounted for not only within the framework of the Union, but also through the development of a rediscovered *ius commune* that has emerged from comparative studies conducted by scholars and from the dialogue among national and international courts. Traditional doctrines regarding juridical facts and rights are presented as analytical tools aimed to construct a jurisprudence that extends beyond national borders.

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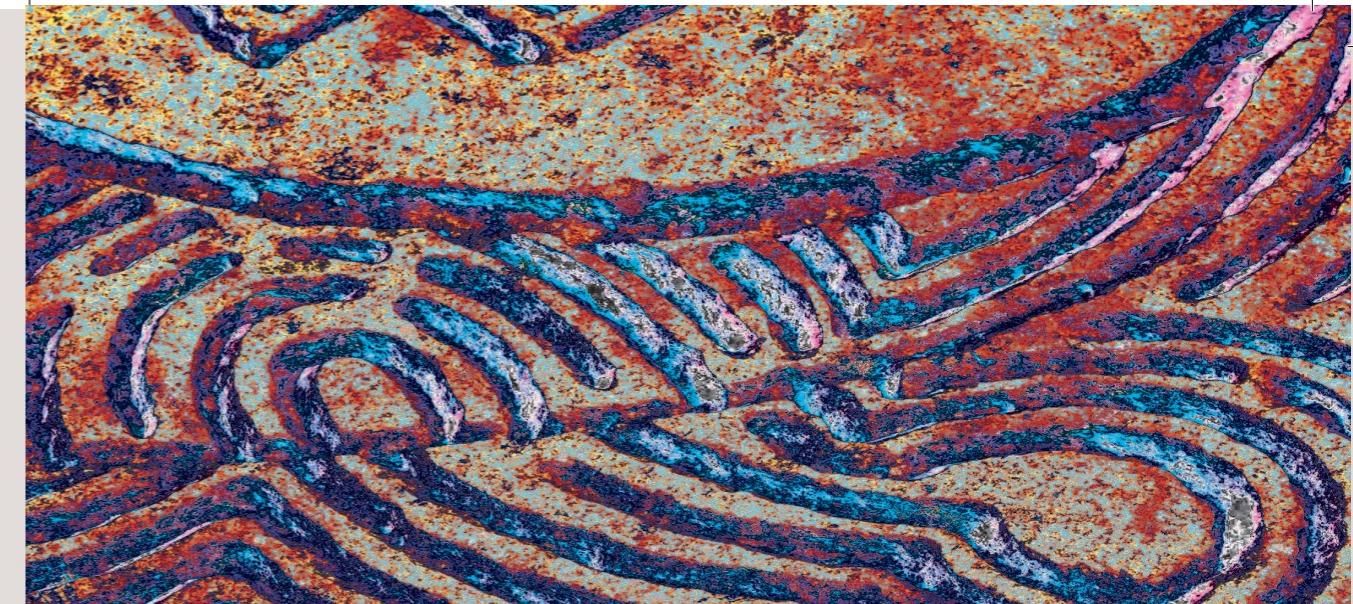
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SIRENA

Introduction to Private Law



PIETRO SIRENA

# Introduction to Private Law

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## Foreword

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- <sup>13</sup> This book draws on my experience of teaching at Bocconi University, where I have been responsible for the course titled *Introduction to the Legal System I* (ILS) over the last two academic years.

When I moved to Bocconi in 2016, this course represented a major challenge for me for several reasons. First, it is a course of law that is taught not in a school of law, but in a school of economics. Secondly, it is addressed to Italian and foreign students on the same footing, and therefore it does not deal with Italian law as such. Even though I was not unaware of some of the unique aspects of Bocconi's international BSc programs (ie the strong interdisciplinary approach and a high level of internationalization), I must confess that I felt somewhat puzzled and unprepared to hold such classes. After all, I had until then been teaching (Italian) law to MA students in law. At Bocconi, I was asked to teach a law that was not Italian (nor of any other national jurisdiction) and to teach it to students who were not necessarily Italian and, furthermore, who were not engaged in legal studies as such. However passionate about investigating comparative law and committed to furthering the development of European law, I was undeniably used to a formalistic and nationalistic approach to (Italian) law, one centered on the exegesis of the

legislature, starting with the provisions of the Italian Civil Code. I had no idea of how to set out a course of law, namely of private law, that deviated from such features, also because I could not find a suitable textbook for me and my students.

Luckily enough, I could count on some younger colleagues who, although based at other universities, were ready to support me as instructors for the six offerings of this course at Bocconi. To two of them, namely Francesco Mezzanotte and Francesco Paolo Patti, I am particularly grateful: had they not worked so hard on preparing classes, I would have been unable to carry out the task I was entrusted with. They did most of the job, I dare say, and they did so with an enthusiasm that was addictive to me. Even more

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<sup>14</sup> importantly, they – as well as Davide Achille – allowed me to enjoy their friendship during one of the most pleasurable periods of my academic life.

Paradoxically, however, this book does not reflect or account for the ILS course as such, which mostly deals with the law of contract, of tort, and of property. After two years of teaching at Bocconi, I realized that I was not able to write a book that contains or accounts for the course I have now grown accustomed to holding. I also realized that, although possible, such a book would not serve the intended purpose of effective teaching. In fact, I understand now that a course of lectures is something less and, at the same

time, something more than explaining the contents of a textbook. It is so because the scheduled hours are always fewer than what they should be, but also, and more importantly, because they are only a portion of the job, both for the teacher and for her students. Classes must be prepared, and they require considerable work before holding them, and also afterwards. The teacher must cast the overall syllabus, select and organize the topics of each class, prepare the reading list, and make the materials available in advance. Students are required to read the relevant materials beforehand and prepare for each class, engage themselves in working with their teacher and, afterwards, revise their notes and make them consistent and useful. It is a huge job requiring an incredible amount of energy and strength! And no textbook can do it in place of the teacher and her students!

Classes are effective and fruitful only if both the teacher and her students are ready to work together on the topics dealt with and to discuss them. A textbook may be of help, but only if it is used as a point both of departure and of reference; conversely, a textbook may endanger the success of classes insofar as the teacher and her students stick to it as if it were the very subject of the course.

On a different note, I am strongly convinced that studying law means, first of all, attaining a certain degree of familiarity with its long history and its

cultural complexity. Law is as old as mankind, and it stands as one of the most intriguing and fascinating phenomena of human culture. It collects hopes and fears, standing as an endeavor to improve the happiness of society and to control and submit its members. Some of the most brilliant minds in history have devoted their best energies to law because they sensed it was the right way to set out a better future for society as a whole. I believe that all this cannot be ignored by students of law, even where enrolled in a different program.

For this reason, I have always feared that teaching the subjects of contract, tort, and property to my students without introducing them to the overall complexity of law could deprive them of much, if not its very essence. I desired to instruct them on each of those topics, but, at the same time, to make them also understand that, when talking of ‘sham trusts’ or of the difference between ‘rights *in rem*’ and ‘*in personam*’, we were actually dealing with a long intellectual history, with battles between ideas, and with trains of thoughts that had been developing for many centuries and that had engaged philosophers, economists, and sociologists.

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Therefore, this book does not mirror the course I teach at Bocconi, but it does serve as a prologue to it, one which was previously destined to remain silent. At the same time, I hope that this will be of use and interest not only in introducing the study

of private law, but also in complementing it, so that students can perceive the cultural complexity of each issue addressed and of each legal institution dealt with.

The chapters of this book were revised and re-organized by some younger colleagues at Bocconi and by some instructors of the last ILS course, namely Davide Achille, Francesca Bartolini, Fabio Saguato, Francesco Mezzanotte, and Francesco Paolo Patti, under the coordination of the latter. They did much more than encouraging me along the way; they indeed improved the quality of my work.

Furthermore, an amazing enterprise of proofreading was organized by Luigi Buonanno. It was carried out by him and by Giacomo Delinavelli, Andrea Maria Garofalo, Cinzia Marseglia, Valentina Ricci, Enrico Maria Scavone, Elisa Valletta, and Antonio Vercellone.

The quality of English in the work was checked and decidedly improved by Fabio Saguato and Peter Liebenberg.

My gratitude towards all of these individuals is great. Errors and mistakes remain mine.

Last but not least, this book is dedicated to my wife Mirzia and to my daughter Caterina, who supported me with their immense love. I owe the best of my life to them.

Milano-Roma, 13 January 2019

Pietro Sirena



# List of abbreviations

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**§/§§** Article/-s of German Civil Code

**ABGB** *Allgemeines Bürgerliches Gesetzbuch*

**AcP** *Archiv für die civilistische Praxis*

**ACQP** *Acquis Principles*

**AI(s)** Artificial Intelligence(s)

**ALI** American Law Institute

**Am Jur 2d** *American Jurisprudence 2nd*

**BA** Bachelor of Arts – Baccalaureus artium

**BGB** *Bürgerliches Gesetzbuch*

**BGH** *Bundesgerichtshof*

**BVerfGE** *Entscheidungen des Bundesverfassungsgerichts*

**CC** *Codice civile*

**CESL** Common European Sales Law

**CFR** Charter of Fundamental Rights of the European Union

**CISG** United Nations Convention on Contracts for the International Sale of Goods

**CJS** *Corpus Juris Secundum*

**DB** *Der Betrieb*

**DCFR** Draft Common Frame of Reference

**EC** European Community

**ECHR** European Convention on Human Rights

**ECJ** European Court of Justice

**ECSC** European Coal and Steel Community

**ECtHR** European Court of Human Rights

**EEC** European Economic Community

**ELI** European Law Institute

**EMU** Economic and Monetary Union

**ERCL** European Review of Contract Law

**ERPL** European Review of Private Law

**EU** European Union

**EURATOM** European Atomic Energy  
Community

**FS** *Festschrift*

**GG** *Grundgesetz*

**HGB** *Handelsgesetzbuch*

**IoT** Internet of things

**IP** Intellectual property

**JZ** *Juristenzeitung*

**MA** Master of Arts

**NGCC** *La nuova giurisprudenza civile commentata*

**NJW** *Neue Juristische Wochenschrift*

**OR** *Obligationenrecht*

**PECL** Principles of European Contract Law

**PETL** Principles of European Tort Law

**PECL** Principles of European Contract Law

**PICC** Principles of International Commercial Contract

**PIL** Private International Law

**RabelsZ** *Rabels Zeitschrift für ausländisches und internationales Privatrecht*

**Riv dir civ** *Rivista di diritto civile*

**Riv dir comm** *Rivista del diritto commerciale e del diritto generale delle obbligazioni*

**Riv trim dir proc civ** *Rivista trimestrale di diritto e procedura civile*

**Rn** *Randnummer*

**Rome I Regulation** Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6

**Rome II Regulation** Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40

**Rome III Regulation** Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing

enhanced cooperation in the area of the law  
applicable to divorce and legal separation [2010]  
OJ L34

**SEA** Single European Act

**TEU** Treaty on European Union

**TFEU** Treaty on the Functioning of the European  
Union

**UCPD** Unfair Commercial Practices Directive

**UK** United Kingdom

**UKSC** United Kingdom Supreme Court

**UNCITRAL** United Nations Commission on  
International Trade Law

**UNIDROIT** International Institute for the  
Unification of Private Law

**US** United States of America

**v** versus

**ZeuP** *Zeitschrift für Europäisches Privatrecht*

**ZGB** *Zivilgesetzbuch*



# CHAPTER 1

## Law and society

- The functions of law
- The law of Western society and of surviving societies
- Law and religion
- Law and technology
- Law and language
- Animal law

Law binds a society's members with the prime purpose of solving their conflicts and, secondarily, of promoting their mutual cooperation. A lawless society could not exist and, conversely, law would be devoid of any real sense outside social intercourse. Since the Enlightenment of the late eighteenth century, law has been increasingly replacing religion as a technique deployed by society to control individuals' behavior. To date, however , law seems to be about to be supplanted by technology, which is credited with being able to carry out similar tasks with lower costs and higher efficiency (code is law).

Law does not require a state or any other kind of centralized authority to develop and carry out its social functions. Therefore, 'primitive' communities, which do not feature those characteristics, are not devoid of law.

Law does not need language to develop and carry out its social functions, although it tends to be spoken and, furthermore, reduced to writing.

It is contested whether some animals live under rules that are comparable to human law.

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## 1. The functions of law

Law exists because and insofar as a society does.

This assumption is embodied in the traditional maxim *ubi societas, ibi (et) ius*, which means that any society is grounded on and underpinned by law

<sup>24</sup> (no society without law). In fact, the assembly of individuals in a society requires the establishment of a certain degree of self-organization, which is provided by law.

The philosophical doctrine advocated by thinkers of early modernity, starting with Thomas Hobbes (1588-1679), traces society's origin back to the exit of mankind from a 'state of nature', which was characterized by the 'war of all against all'. [1] The negotiation of a **social contract** would have marked the foundation of society, where men agreed to exchange a certain degree of their own freedom for the advantages of mutual cooperation. The very source of law was thus to be identified in the constitutional act of society itself, which implied allegiance of every citizen to the order thus established and to the authority necessary to maintain it.

If society necessarily requires a law, it also holds good that, conversely, law outside a society would constitute a mere abstraction, which were devoid of any concrete sense (no law without society).

Robinson Crusoe, being castaway on a desert island, might not be said to abide (or not) by law, nor to be entitled with any right whatsoever. Any

possible domain of law commences when there is a mutual relation between individuals, who come together in a group. A sole individual who finds herself alone and segregated from the rest of mankind would live beyond any possible law.

The reasons why law exists are therefore to be identified in its social functions. [2]

First, law serves the purpose to prevent and, as the case may be, to solve conflicts among the members of a group, which are inevitably raised either by the scarcity of resources or by different views on the common good. Insofar, law is aimed at impeding the disruption of society (**negative function of law**).

Secondly, law provides guidelines of behaviors deemed to be beneficial to the survival or rise of a group, thus fostering and strengthening cooperation among its members. Insofar, law is aimed at enhancing the unity of society (**positive function of law**).

Georges Gurvitch (1894-1965) drew a distinction between ‘individual law’ and ‘social law’, [3] which would correspond to different forms of sociality. ‘Individual law’, particularly, would be moulded on sociality by interdependence and based on distrust, whilst ‘social law’ would be moulded on sociality by interpenetration and based on confidence. Therefore, a law of war, conflicts, and separation would be opposed to a law of peace, mutual

aid, and common tasks.

Social conflicts addressed by law consist firstly in disputes, which, when arising with regard to goods claimed by many an individual, potentially engender a winner and a looser. Mechanisms devised by law in order to settle disputes may be constituted by mechanical procedures (eg by taking of oaths, or by ordeal, or by combat)<sup>[4]</sup> or by human decisions. When such mechanisms grow significantly over time, however, their overall output tends to be rationalized in a set of precepts or tenets, which serves to make the settlement of future disputes predictable and consistent with the previous ones. Law may thus solve not only concrete (individual) conflicts but also abstract (general) ones, thus contributing to framework society as a whole.

Max Weber (1864-1920) depicted the historical development of the inner rationalization of law (*Rationalisierung des Rechts*) as based on two processes: generalization (*Verallgemeinerung*) and, in a later stage, systematization (*Systematisierung*) of legal concepts. He furthermore clarified that these two processes are not only separate (generalization would not necessarily produce systematization), but they may prove even incompatible (generalization would be compatible with a substantive legal rationality,

whilst systematization would impose a formal legal rationality). [5]

A lawless society is not actually conceivable and, even if it were, it would hardly stand as a better alternative to the loneliness of individuals acting on their own. As a matter of fact, it would be quickly upset and ruined because of the conflicts arising from the natural instincts and selfishness of its members. At best, it would be doomed to a low degree of development, due to the lack of cooperation among its members and guidance for their behavior.

A lawless society seems to have been envisaged by Karl Marx (1818-1883) and Friedrich Engels (1820-1895) in the aftermath of the revolution of the proletariat, when the overcoming of class struggles would lead people to live together in a spontaneous state of harmony and peace. This utopian vision relies upon the premise that law, as well as morality and religion, would consist in ‘bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests’.

## 2. Law and religion

Insofar as law is purported to avert the disintegration of a society and to neutralize its inner centrifugal forces, law exhibits remarkable

<sup>26</sup> commonalities with religion. According to a famous dictum by Carl Schmitt (1888-1985), ‘all significant concepts of the modern state are secularized theological concepts’.<sup>[6]</sup>

Not surprisingly, therefore, it happens that law and religion are entrenched, or even largely overlaid, although their connection may tend to be lost or become obsolete over time. As pointed out prominently by H. Patrick Glenn (1940-2014), each legal tradition is founded upon a **substrate of religious nature**, which moulds the shared mentality of lawyers (and laymen) and the fundamental traits of law.<sup>[7]</sup> This religious substrate may endanger dialogue between legal traditions, let alone their integration.<sup>[8]</sup>

At the historical outset of law there is often the authority of religion, since it is a god that stipulates what is good and what is evil for the community and mandates its ministers to interpret and apply its own will. Therefore, religious authorities tend to bind the behavior of individuals and to scrutinize it.

Both law and religion may be therefore understood as **techniques of societal control**.

In the West, the Enlightenment of the late

eighteenth century decidedly marked a pervasive secularization of society and the increasing replacement of religion with the state's legislature and judicature. Since then, religion has been increasingly confined to the private sphere of individuals and lost its grip on Western politics and social life.

For example, one of the main novelties of private law during the French revolutionary period was that marriage was turned into a civil contract and thus removed from the jurisdiction of ecclesiastical tribunals. As a further consequence, divorce was legalized in 1792 (see *infra*, ch 4, para 3.1.1).

### 3. The process of juridification of Western society

The replacement of religion's social authority with a state constitutionally based on the **rule of law** (*Rechtsstaat*) commenced a large process of juridification (*Verrechtlichung*) of Western societies, purported to prevent class struggle and to avoid political conflicts based on the selfish interests of single individuals or groups.<sup>27</sup>

The concept of juridification (*Verrechtlichung*) was forged by Otto Kirchheimer (1905-1965) in the late 1920s, to depict the rise of labor law as a means to overcome the conflict of interests between entrepreneurs and workers.

A critical attitude against the overall process of juridification of society was afterwards developed by other followers of the 'Frankfurter School' of social theory and philosophy, and particularly by Jürgen Habermas, who advocated for the need of counteracting the juridification of society by improving democratic practice and citizens' participation in political debate.

This process favored the intervention of the state in areas of social life which had previously been left to the freedom of single individuals and groups, thus expanding the realm of societal control upon their behavior. According to Michel

Foucault (1926-1984), law has thus normalized the style of living and enforced social stereotypes, particularly banning preferences not in line with the patterns authorized by the force of the majority.

It must nonetheless be remarked that law still had to compete with (religion and) **other systems of private ordering** to hold a grip on such societies, which therefore gained and maintained a considerable degree of pluralistic attitude, except for single periods of totalitarianism (during some developments of the French revolution, in Germany and Italy between the 1920s and the 1940s, and so on).

In his work *Droit flexible*, Jean Carbonnier (1908-2003) remarked that many contexts of human life are devoid of law and regulated instead by other systems (religion, friendship, technology, and so on). He depicted his theory as based on the *hypothèse du non-droit*. [9]

## 4. Law and technology

To date, a further technique of societal control is rapidly gaining dominance in societies worldwide, and it tends to replace both religion and law in this context, as well as different systems of private ordering. In fact, the development of predictive and communication technologies and the possibility of mining a huge amount of data and information scattered on the Internet about the behavior and the choices or preferences of each member of a society (**big data**) make it possible to control the life of its members in a pervasive way that was not previously experienced by mankind. The advent of **digital law** based on an information society is thus going to pose a dramatic challenge to the privacy protection of individuals and organizations, as well as to the principle of equal treatment. Even more, any concept of law or approach to the enforcement of legal rules experimented with until now is becoming obsolete. [10]

Smart phones, laptops and communication devices are permanently connected to the Internet and, no less importantly, the same is occurring with domestic appliances, vehicles and the like (**Internet of things**). [11] As a consequence, a growing spectrum of daily behavior and personal choices is traceable, so that all information thus collected is recorded and oft traded.

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The level of detail attained by this information potentially enables the replacement of the abstractness and generality of legal rules and standards with ‘**granular norms**’, [12] ie personalized directives which are to be moulded on the track record of relevant information and continuously communicated to everyone (though one’s vehicle, one’s mobile phone, and so on). [13] For example, the maximum speed limit currently set for all drivers would be replaced by a targeted determination of the maximum of speed based on the personal skills and actual physical conditions of each driver, the weather forecasts for the date when the car will be driven, and so on. These assessments imply not only a large availability of personal information, but also a certain number of assumptions which may endanger the principle of non-discrimination, insofar as they embody social stereotypes and standardized patterns of behavior (Do women drive better or worse than men? Do elderly people drive better or worse than younger individuals?).

The track record and mining of personal information on a large scale may even become determinative in adjudicating cases involving civil or criminal liability. For instance, courts are beginning to use smart machines and artificial intelligence systems to evaluate the risks of recidivism, ie the likelihood of a suspect’s reoffending (**predictive justice**). [14]

On a different note, contracts concluded and

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governed through algorithms (**smart contracts**) are designed to implement self-performing remedies, which, for example, automatically terminate them in the event they are breached by one of the contracting parties. [15] The rules applicable to performance and termination of such contracts, as well as a large number of legal and factual assessments which have been traditionally committed to a judge (Is a breach of contract material? Is the non-performing party at fault?), are therefore governed by algorithms. [16]

**Unmanned cars**, which are capable of autonomous driving, must be programmed in order to take decisions which may affect the property and life not only of passengers on board but also of other people accidentally involved in their movement. [17] For example, a crash avoidance maneuver may imply a decision whether the life of passengers on board is to prevail over that of the pedestrians who are going to be hit.

The assumption that decision-making by artificial intelligence, smart systems, and the like is compliant with legal rules and standards leads to the wishful thinking that they are but neutral mechanisms to implement the application of law in a more efficient and impartial way, not biased by personal beliefs and the individual preferences of a judge or an official (**law is code**).

In so far as no room is left to discretionary interpretation by humans, however, law is

withering and being replaced by mechanisms of societal control which differ from those enshrined in legal principles and rules and the reasoning developed for many centuries on their basis (**code is law**). [18] This implies a shift of decisional power from lawyers to technocrats, as well as from the humanities (or arts) to the sciences. This implies a shift as well from the analogic reasoning of law and religion to the digital functioning of machines.

## 5. Western law and the law of surviving societies

Given the tight nexus between law and society, it is not surprising that law exhibits traits which are <sup>30</sup> greatly mutable throughout the world, since they mirror the immense variety of social and cultural forms which characterize mankind. [19]

Because of their economic, politic and cultural predominance Western societies nevertheless amounted to forge a Western paradigm of law, which tends to be identified with the law itself. The risk is thus engendered that the contingent and relative features of their laws are turned into necessary and absolute requirements of law as such, so that any societal organization not matching Western standards may be deemed to be devoid of law at all (ethnocentrism). [20]

‘Anthropology of law, or legal anthropology, is the field of anthropology where the focus is on the normative aspects of cultural and biological human life that are based on the law (law defining) elements of authority and sanction [...]. Thus, the anthropology of law will find itself embedded in more general themes of anthropology such as religion, customs, behaviour, and neurology’. [21]

The risk that Western law is considered as the final stage of the history of mankind is thus also

engendered, where any possible instance of progress and civilization would have been brought to perfection (**traditionalism**).

Lewis H. Morgan (1818-1881) assumed that the history of mankind is to be recapitulated as a progress of ‘ethnical periods’, running from the bottom (of savagery) through a middle status (of barbarism) up to the top (of civilization). Each of the first two periods would in turn be divided into three subperiods, corresponding to a lower, middle and upper status of savagery and, respectively, barbarism. [22]

According to Henry Sumner Maine (1822-1888), the historical development of law is invariably structured in three consecutive stages. At its very outset, law would be dictated by a deity or a divine agency, [23] who afterwards would give way to an epoch of customary law, [24] eventually followed by one of written codes. [25]

In his masterpiece about matriarchy (*Mutterrecht*), [26] which commanded a wide consensus between the end of the nineteenth century and the beginning of the twentieth century, Johan Jakob Bachofen (1815-1887) reinterpreted the history of mankind as a struggle between women and men about taking over control of religion and society. Particularly, after a first period of communistic

and polyamorous living, called Hetaerism and allegedly ruled by an early proto Aphrodite, women would have taken power, founding a society based on agriculture and the cult of an early Demeter. A transitional (Dionysian) period would have followed, after which patriarchy began to emerge and eventually triumph under the lead of Apollo, thus establishing modern civilization.

A universal process of continuous refinement of law was thus laid down, which implicitly identifies its more ‘primitive’ stages in far-off or ancient societies and its acme in contemporary Western societies. This value judgment is currently rejected as well as its underpinning of historical determinism, which was largely imbued with both Hegel’s philosophy of history and Darwin’s doctrine of evolutionism.<sup>[27]</sup> Furthermore, it is highly disputable whether it is possible to infer that Western societies in the previous stage of their historical development might have had the same characteristics of primitive peoples.<sup>[28]</sup>

Particularly, it is contended whether law necessarily requires an institutional authority to be in charge of its enforcement and, in that case, what requirements such authority should meet. The first question has long been answered in the affirmative and the state and its officials (as courts) have been identified as the central authority that law must be enforced by.<sup>[29]</sup>

However, experience shows that law is not necessarily incompatible with vengeance and other devices of self-help, provided that they may follow up on the settlement of a dispute.<sup>[30]</sup> More generally, many a (cultural) factor may trigger people's abidance by law, including psychological or even neurological issues.

To that extent, law may well be encountered in primitive tribes or indigenous peoples which do not acknowledge central authorities in charge of its enforcement.<sup>[31]</sup>

Determinative of this view were the inquiries by Bronisław Malinowski (1884-1942) in the Trobriand Islands,<sup>[32]</sup> which are generally considered as the first application of ethnographic methods in the study of law.<sup>[33]</sup>

Law of primitive communities or peoples is investigated by legal ethnology, which in the Anglo-American academical environment is mostly classified as a branch of legal (or cultural) anthropology.<sup>[34]</sup>

In the United States, a true pioneer of the discipline was E. Adamson Hoebel (1906-1993), who undertook his researches under the supervision of Karl N. Llewellyn (1893-1962).

With his masterpiece, *The Law of Primitive Man*, Hoebel contributed decisively in raising an interest of legal realism towards non-Western legal cultures (see also *infra*, ch 7,

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para 4).<sup>[35]</sup>

## 6. Mute law

At its historical outset, law oft consists in a corpus of oral traditions, which are handed down from each generation to the next. At this stage, it tends to be deeply entrenched with the customs of a community.

At a certain degree of its development, law tends to be reduced to writing and embodied in a text which makes it stable. Initially this text is often secret, subsequently it becomes accessible to a small circle of adepts, and eventually it is somehow published.

In all these forms of its consolidation and transmission, law is conveyed through linguistic signs, whether oral or written. **Law and language** are therefore strictly associated. [36]

It has however been suggested that, in the history of mankind, law may have preceded language, since legal rules can be acknowledged and followed even by people who are not able to conceptualize and convey them through language. Therefore, also human species which existed before those of *homo sapiens* and of *homo neanderthalensis* might have had their own law, which, therefore, would have been ‘mute’, ie conceptualized and conveyed not through language, but merely by conduct. [37]

According to Rodolfo Sacco, mute law is that which nature taught to all

living beings (*quod natura omnia animalia docuit*, as natural law was defined by the Roman jurist Ulpianus). During the Bronze Age it would have been overridden by rational and spoken law, but it would never completely have ceased to operate. Spoken and unspoken sources of law would coexist in contemporary legal systems, some legal acts would be performed through words (by fax, deeds, wills, and so on) and others by mere conduct (deliveries, vending machines, and so on). Nonetheless, lawyers would be primarily interested in spoken sources and acts and would feel uneasy with mute sources and acts.<sup>[38]</sup>

## 7. Animal law

If law is explained in terms of behavior taken by members of a group, its ‘human’ nature may be questioned, since it is a widespread assumption that animals (or at least some species) are able to gather in organized groups and therefore to act like members thereof.

Conversely, the question is raised whether (some) animals could be considered as members of society, thus being potentially vested with rights and duties (see *infra, ch 11, para 1*).

**Glossary**

**Biographies**

## CHAPTER 2

### The Western legal tradition

- The Roman origins of the Western legal tradition
- The Justinian compilation and its historical role
- The medieval renaissance of Roman law
- The development of continental *ius commune* and the advent of national codifications
- The parallel development of the English common law and equity

The Western legal tradition is firmly based on the legacy of Roman law, transmitted over centuries through the Justinian compilation.

Roman law was organized in a highly specialized and autonomous field of rational knowledge, which jurists developed over time to govern social conflicts and to provide a shared education, culture, and mentality to officials and professionals involved in the steering of society.

The foundations of the Western legal tradition may be traced back to the renaissance of Roman law, which took place between the end of the eleventh and the beginning of the twelfth century.

In Bologna, Irnerius discovered a copy of the *Digestum* and began to comment on it and teach it along with the other books of the Justinian compilation in the universities. Glossators and Commentators carried on his work through particular techniques which saw them construe the sources of Roman law according to the needs of medieval society, thus creating a lively law in action.

In the same period, the Catholic Church was reformed and organized as a political

institution, thus starting to develop a law of its own: ‘Canon law’ (or ‘canonical law’), which, albeit to a lesser extent than civil law, was also based on Roman legal thinking.

In continental Europe, the combination of Roman law collected in the Justinian compilation and the apparatus of its ‘scientific’ interpretations by scholars (*communis opinio doctorum*) became the general law (*ius commune*) applicable. During the seventeenth century, the universalism of the *ius commune* was increasingly challenged by the overwhelming complexity of the interplay between the sources of Roman law and the many strands of local law. This led to an exasperated legal particularism, which, through the rationalization and simplification of private law, favored the advent of the great civil codifications of the states of continental Europe.<sup>46</sup>

In England, by contrast, it was the functioning of a royal and centralized jurisdiction that, in the late twelfth century, eventually created a ‘common law’ of the kingdom, which was later on flanked by ‘equity’ administrated by the Chancery. The rivalry between common law courts and equity courts became apparent in the sixteenth century and reached its peak in the seventeenth century, when King James I finally proclaimed that ‘equity shall prevail’. The two legal bodies continued to exist in parallel until the late nineteenth century, when in most Anglo-American jurisdictions (starting with the US) their duality was terminated by the legislature (though it was disputed whether this happened only at the procedural level or also at the substantive level of the law). All attempts to codify English law failed, whereas they eventually bore some fruit in the US.

## 1. The Roman invention of law

The laws of Western societies are based on Roman law.<sup>[1]</sup> By and large, Western law as such is an invention of the ancient Romans,<sup>[2]</sup> standing as the utmost expression of their national genius,<sup>[3]</sup> as philosophy was to ancient Greeks.

A certain influence of Greek thought on Roman law is to be acknowledged,<sup>[4]</sup> but it seems to have been rather modest.<sup>[5]</sup>

Greek thought, being highly speculative and abstract, contributed decidedly toward laying the philosophical foundations of law but less toward its establishment as a social practice gaining some autonomy from politics as such. While discussions among Greek philosophers about the conflict between the laws of the city and those of nature, or about the paradigm of democracy as a political regime, may be fundamental for Western civilization, it does not seem that they acknowledged an overall concept of law that could embrace both the legal rules applicable to citizens and the legal process.<sup>[6]</sup> What is certain is that many city-states (*πόλεις, poleis*) issued a specific set of statutes (*νόμοι, nomoi*), but only very few of them survived the centuries.

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A recognition of ancient Greek constitutions, some of them being real and others being instead figments of imagination, is contained in Aristotle's *Politics*,

where they are classified into six brackets.<sup>[7]</sup> A similar taxonomy, which has a comparative character (see *infra*, ch 3, para 3.1), is set forth in Plato's dialogue titled *Statesman*.<sup>[8]</sup>

The two major city-states, namely Sparta and Athens, were famed for their constitutions, their being attributed to legendary legislators (Lycurgus and, respectively, Draco and Solon). A text tentatively attributed to Aristotle (or to his disciples), entitled *The Constitution of the Athenians* (or *Athenian Constitution*), is an important source of information on this set of legal rules.<sup>[9]</sup>

The novelty of Roman law does not exclude, however, that it could have been forged and historically developed thanks to the influence of other ancient cultures and civilizations. To the extreme, it has been fiercely claimed that Roman law was devoid of any originality, consisting instead of a patchwork of transplants from other cultures, particularly of Middle Eastern and northern African civilizations.<sup>[10]</sup> Yet even if true, it would be hard to deny that it was precisely in ancient Rome (and nowhere else) that all those items were combined into a unique mix, thus generating the peculiar phenomenon which constitutes Western law. Particularly, the establishment of a professional cadre of jurists is a distinctive feature of Roman society, one which

is not be encountered in any other civilization of the antiquity (including that of the Greeks).

Law was called *ius* by the Romans, a term whose etymology is still obscure and largely disputed. The prevailing view surmises that its root meant ‘pureness’ and was underpinned by some religious stance (see *supra*, ch 1, para 2). The pureness of law must have originally consisted in a state of peace with the demons and the powers of evil, which was reached at court by casting the appropriate spell during the rite of the trial. The ‘pure’ party thus gained the victory over its ‘impure’ opponent. [11]

Accordingly, primitive trial in Roman law was much akin to a religious sacrifice, but at the same time it marked a first step towards the secularization of law and overall society (see *supra*, ch 1, para 2). As the sacrificial victim was killed by the priest because it was impure, so the condemned party was defeated because it was guilty. *Ius* (as law of men towards other men) was subsequently to depart from *fas* (as law of men towards gods). [12]

In neo-Latin languages, the root of *ius* proved highly productive and engendered words like *just*, *justice*, *jurisprudence*, *jurist*, *jurisdiction*, and *juridical*. Nevertheless, in the common parlance of the Middle Ages the word itself fell out of use. As meaning ‘law’, *ius* was replaced by the term *directum*, which meant ‘the

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straight', or, 'the right way' (to behave oneself). In neo-Latin languages it turned into French *droit*, Spanish *derecho*, Portuguese *direito*, and Italian *diritto*; and we also find German *Recht* and English *right*. In German-speaking territories, it is only the faculty of law that is still nowadays called *Ius*, or *Iura*.

In civil law systems, the same term is used in both the objective sense of law and in the subjective sense of a right (see *infra ch 10, para 4*).

In its earlier stages (753 bc-451 bc), Roman law was confined to a number of fixed procedures and imbued with an extreme formalism, which however loosened through the historical development of the trial system. In fact, attention increasingly shifted from the law to be applied to the judicial proceedings as such, to the law to be applied to the facts alleged by the parties. Roman law thus gained a substantive dimension. [13]

In the late Republic (201 bc-27 bc), jurists (*prudentes*) became a cadre of experts learned in law, whose legal decisions (*responsa*) were at first rendered mainly on the basis of intuition and experience acquired through the administration of justice. [14] Over time, however, their decisions were increasingly discussed as being principled and rationally grounded, thus showing a high degree of reasoning. [15] The collections of the legal decisions authored by the most prominent classical jurists gradually constituted a body of

specialized literature (see *infra*, ch 2, para 2), which eventually amounted to the foundations of a proper *iurisprudentia* (legal wisdom, or legal knowledge). [16]

Indeed, what characterized Roman law is that it was organized in a **highly specialized and autonomous field of rational knowledge**, which jurists developed over time to govern social conflicts and to provide a shared education, culture, and mentality to officials and professionals involved in steering society and addressing its development. [17] Although increasingly challenged by contemporary legal realism, Western law is still styled as being endowed with an inner rationality and an ideal existence, [18] which oppose its single application to empirical facts and, in so doing, raise expectations of justice.

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## 2. Classical Roman law and the Justinian compilation

It should be noted that Roman law as such is a rough (and possibly detrimental) abstraction.

First, Roman law cannot be depicted as a stable and full-fledged legal system, which came to light once and for ever at a certain point of history.

Rather, it had been growing and changing tremendously over many centuries, during which its own content and structure underwent a deep and wide historical evolution. Therefore, what is called Roman law has never existed as such, its representing instead an unhistorical mixture of legal concepts, stances, and measures belonging to distant ages and pertaining to different contexts.

It was especially Riccardo Orestano (1909-1988) who strongly insisted on the necessity to historicize ‘Roman law’ as such and to distinguish it from the ‘tradition’ it has initiated, thus dismissing any form of ‘crypto-natural law’. [19]

Particularly, the foundation of the Western legal tradition rests on a relatively tiny span of that very long history, namely the **Roman classic law** that flourished between the end of the first century bc and the beginning of the third century ad. Conventional as dates of this kind may obviously be, its rise was marked by the creation

of the Empire (27 bc), and its fall was parallel to the beginning of the ‘Crisis of the Third Century of the Empire’, or ‘Military Anarchy’ (ad 235).

Secondly, our knowledge of Roman law is necessarily partial and inaccurate, and sometimes deceptive. In fact, almost all that Roman jurists of the classical age (such as Pomponius, Ulpianus, and Paulus) wrote, ie more than two thousand books, did not survive the ‘dark centuries’ of the early Middle Ages, which followed the **fall of the Roman empire** in the western provinces (ad 476).

In ad 476 Odoacer (433-493), an officer of what had remained of the Roman army, was proclaimed by the Germanic *foederati* as king of Italy (*rex Italiae*) and afterwards deposed the young Emperor Romulus Augustus (derisively nicknamed as Augustulus, ie little Augustus).

Edward Gibbon (1737-1794) popularized this event as the fall of the ‘Western Roman Empire’, [20] an expression which actually does not indicate a political entity on its own, but only the Western part of the Roman Empire, which had settled its own abode in Ravenna.

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During the upheavals of that troubled age, most of classical culture, which the Greeks and the Romans had bequeathed to mankind, went lost, except for the works that the amanuenses of the monasteries preserved and copied for posterity. Unfortunately, parchments used as media to be

written on were rare and costly, so that they were recycled many times (*palimpsests*). In fact, monks were accustomed to treating old parchments containing writings they were not interested as a convenient medium which could be used again in the drafting, or even in the binding, of other (mostly theological) texts.

The sole work of Roman we possess in its original text is Gaius's *Institutiones*. It consists of a handbook of law written around ad 161 by a law teacher, Gaius (130-180). In 1816, Barthold Georg Niebuhr (1776-1831), an ambassador and minister plenipotentiary of the Holy See at the Prussian state, made a stop in Verona during a long journey and, while visiting the local chapter library, a famous repository of ancient manuscripts and incunabula, intuited that a ponderous volume of St. Jerome's theological works was a palimpsest, which contained an even more interesting text. It was that of Gaius's *Institutiones*, which was subsequently edited with the cooperation of some of the most prominent scholars of Roman law of the time, namely Friedrich Carl von Savigny (see *infra*, ch 4, para 3.1.2) and Gustav (Conrad von) Hugo (see *infra*, ch 4, para 3.1.2). Unfortunately, the methods used to recover the hidden text destroyed it partially. The gaps were later on filled in thanks to the other sources found in

the meantime, particularly a papyrus writing coming from Egypt and published in 1933 by Vincenzo Arangio-Ruiz (1884-1964). Thus, it was possible not only to have a (nearly) complete text of Gaius's *Institutiones* but also to attain evidence that it was genuine.

What remained of Roman law and was transmitted to us is contained (almost) exclusively in a compilation assembled in Constantinople (Byzantium) during the sixth century ad at the behest of the emperor Justinian I (482-565), therefore known as the **Justinian compilation**. Actually, this vast anthology served like a kind of 'Ark of the Covenant' that worked to rescue the legacy of Roman law from the deluge of the early Middle Ages and pass it on over the centuries. In doing so, Justinian decidedly contributed in setting the foundations of the Western legal tradition.

The celebrated forty-fourth chapter of Edward Gibbon's *The Decline and Fall of the Roman Empire* commences with these significant words: 'The vain titles of the victories of Justinian are crumbled into dust; but the name of the legislator is inscribed on a fair and everlasting monument'.<sup>[21]</sup>

In fact, after acceding to the imperial throne in Constantinople (Byzantium), in ad 527, Justinian

mandated a commission, chaired by Tribonianus, to draw up a collection (*Codex*) of snippets from the *constitutiones* (statutes), ie the normative measures issued by the emperors from the age of Hadrian and previously already gathered in a number of similar works which had been set out over time. This task was accomplished in ad 529.

After putting the legislative acts of the political power (*leges*) into order, Justinian charged the same commission with the task of doing the same with the corpus of jurisprudence (*iura*) contained in the best opinions and writings authored by jurists during the classical age of Roman law. Thus, in ad 533, a book was edited that was called the **Digest** (*Digesta* or, according to the Greek equivalent, *Pandectae*), meaning a well-ordered compilation and collection of texts.

It consists of a huge collection of excerpts from about two thousand writings of the most important Roman jurists (*iuris prudentes*) of the classical age, which stands for us as the only means to become acquainted with their legal thought.

Our knowledge of classical Roman law is therefore very limited in quantity, since the fragments collected in the Justinian compilation represent a shred of the overall corpus of Roman legal literature, the compilation being estimated as amounting to five per cent of Roman legal authors' literary production. [22]

Secondly, and perhaps more importantly, it is

quite likely that the works used for the Justinian compilation were not always genuine, several of them having undergone a process of alteration during the post-classical period. [23] Some of these modifications may have been voluntary (abridgments, simplifications, apocryphal works, and so on), some others involuntary (oversights, mechanical errors of transcription, and so on).

Furthermore, Justinian himself commanded Tribonianus and the other commissioners to modernize the fragments they were in charge of collecting and to adapt them to the new social needs, since they were taken from writings dating back to many centuries before.

These amendments made by the Justinian commissioners to the text of the collected fragments bear the traditional name of ‘interpolations’.

[24]

Whilst the *Codex* continued to be used after Justinian, the *Digesta* were nearly destined to disappear, or at least to be neglected during the early Middle Ages. In fact, due to its classicism and the highly sophisticated level of legal reasoning they embody, the *Digesta* contained texts that must have afterwards appeared too difficult and far removed from contemporary problems, owing to the dramatic sinking of the general level of culture, particularly in the area of law.

Remaining in use after Justinian was

not the above-mentioned *Codex* of ad 529 (traditionally styled as *prius* or *vetus*), but its second edition, issued in ad 534 (*Codex repetitae praelectionis*). Furthermore, the Justinian compilation comprised the *Institutiones*, issued in ad 533, and the *Novellae constitutiones*. The *Institutiones* were a textbook mainly directed to teaching but binding as a source of law as well. The *Novellae* collect the *constitutiones* enacted after ad 534 and until Justinian's death.

### 3. The medieval renaissance of Roman law

The foundation of the Western legal tradition may be traced back to the renaissance of Roman law, which took place between the end of the eleventh century and the beginning of the twelfth century.

According to Harold J. Berman (1918-2007), the outset of the Western legal tradition should be traced back to the great papal revolution which took place in the late eleventh century, when Pope Gregory VII re-founded the Catholic Church as a mundane institution based upon law (see *infra*, ch 2, para 4.1). Since then, Berman claims, the Western institutions would have grown seamlessly over time, since each generation would have willingly constructed its own work upon that of the generations before. Even the major nation revolutions (as the French of 1789 and the Russian of 1917) would be in line with the legal tradition, which they (or their leaders) still purported to overcome.

[25]

At the time, a jurist called Irnerius, also known as Wernerius, or Guarnerius (1050?-1125?), possibly of German origin, discovered in Bologna a copy of the *Digestum* and began to comment on it and to teach it and the other books of the Justinian compilation. His comments on the fragments of

the Justinian compilation, which were written between the lines of the manuscript or on the margins, thus formed a critical apparatus called *glossa*.

It is possible to draw a parallel between the medieval exegesis of the Justinian compilation and that of the Bible. During the Middle Ages, both law and Catholic religion were based on a ‘sacred’ book and its interpretation (see also *supra*, ch 1, para 2).

On a different note, during the Middle Ages Roman law commanded an allegiance which to some extent was not exempt from religious respect. This was reflected also in the historical figure of Justinian himself, who Dante portrayed in the *Paradiso* of his *Divina commedia*.

In a short time, young people from the four corners of Europe gathered around Irnerius, eager to listen to him and to be guided on the subtleties and profundities of Roman law. A school (*studium*) was therefore born, probably in 1088. The first university of the (Western) world was thus established: the *alma mater studiorum*, as the University of Bologna still nowadays styles itself proudly.<sup>[26]</sup>

This primacy may be to some extent challenged by the medical school that around 1057 had been established in Salerno and that

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University of Bologna still nowadays styles itself proudly.<sup>[26]</sup>

maintained great reputation throughout the Middle Ages.

Irnerius used to begin his lessons by reading a fragment of the Justinian compilation aloud (in fact, the term ‘lesson’ comes from the Latin verb *legere*, meaning ‘to read’). After being read, each fragment was explained, and its meaning clarified through the discussion of pertaining cases.

Students attending Irnerius’s lessons copied the texts of the *Digesta* he used (*littera bononiensis*) and, returning to their native countries, brought them home, thus contributing to its dissemination all across Europe.

Irnerius’s work was carried on by his four disciples (Bulgarus, Martinus Gosia, Jacopus de Boragine, and Hugo de Porta Ravennate), who transmitted his methods to future generations of scholars, known as **Glossators**.<sup>[27]</sup> The most prominent among them were Azo (1150-1225) and his disciple Accursius (1184-1263), whose *glossa* commanded so wide a consensus as to be acknowledged as a staple text for studying and applying law all across Europe, thus amounting to a cornerstone of the Western legal tradition. This *glossa* was therefore depicted as *magna*, or *ordinaria*, or *magistralis*.

Between the thirteenth and the fourteenth century, a renewal of the Bologna technique of interpreting

the Justinian compilation was accomplished by the Commentators,<sup>[28]</sup> who were characterized as being less stuck on the text and more inclined to interpret it on the basis of its rationale, thus adapting it more promptly to the needs of contemporary society. The most prominent among them was Bartolus de Saxoferrato (1314-1357) and his disciple Baldus de Ubaldis (1327-1400).

## 4. The continental *ius commune* and the English common law

### 4.1. *Corpus iuris civilis* and *Corpus iuris canonici*

Secular law applied across Europe was therefore centered on the Justinian compilation, which the epithet of *Corpus iuris civilis* was therefore

<sup>54</sup> bestowed upon, i.e. the 'body' of civil law.

According to the teaching methodology of the school of Bologna, the Justinian compilation was reorganized into five parts, the so-called *Libri legales*. The first three of these consisted of portions of the *Digesta*, following the order they had been supposedly rediscovered by Irnerius (*Digestum vetus*, *Infortiatum*, *Digestum novum*). The fourth tome contained the first nine books of the *Codex*. The rest of the *Codes*, the *Institutions* and 134 of the *Novellae* – subsequently supplemented by a collection of feudal books (*Libri feudorum*),<sup>29</sup> which formed the so-called *decima collatio* – were gathered in the fifth and last tome.

In continental Europe, the paradigm of legal education was constituted by the *Digestum vetus* and the first nine books of the *Codex*.

The work of Glossators and Commentators (see *supra*, ch 2, para 3) was strongly characterized by

an overall tendency to disregard the historical remoteness of the Justinian compilation and to interpret it pragmatically as a lively source of law in action. Therefore, Glossators and Commentators were not so much interested in ascertaining what the authors of these texts intended to say in the far past when they had been living and working, but what the texts could still contribute in addressing and solving social problems after so many centuries . The tremendous changes that had in the meantime occurred in society and political institutions drove Glossators and Commentators to undertake a mighty endeavor of creative interpretation and adaptation of those ancient texts, so that they could cope with a material world so different from that known to their authors. Since Glossators and Commentators had been active in Italy, their methodology became characterized as *mos italicus* (ie Italian usage, or Italian style).

During the sixteenth century the spread of Renaissance humanism challenged the Italian style and aimed at searching for the original

purity of Roman law.<sup>30</sup> The texts of the Justinian compilation were subject to a critique based on a historical-philological method. Its main representatives may be identified in (Giovanni) Andrea Alciato, also known as Andreas Alciatus (1492-1550), and his disciple Jacques Cujas, *alias* Cujacius (1522-

1590), as well as in Hugues Doneau, also known as Hugo Donellus (1527-1591). Since the forerunner of the method, namely Alciato, had – though Italian – taught predominantly in France, these methods flourished particularly in that country, so that they were defined as *mos gallicus* (ie French usage, or French style).

A continuation of the philological interests and the humanistic approach that distinguished the *mos gallicus* can be seen in the **Dutch Elegant School**, which flourished in the Netherlands during their Golden Age of the sixteenth century, particularly in the University of Leiden (founded in 1575). Among its most significant exponents are Gerard Nood (1647-1725) and Ulrich

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Huber (1636-1694).<sup>[31]</sup>

The apparatus of comments enshrined in the *glossae* grew over time, up to the point that comments were no longer written between the lines or on margins of the Justinian compilation but published as a work of their own. Rapidly, the most widespread opinions rendered by the scholars of law (*comunis opinio doctorum*) became as authoritative as the Justinian compilation itself.<sup>[32]</sup>

During the thirteenth and the fourteenth centuries, the combination of Roman law

collected in the Justinian compilation and the apparatus of its doctrinal interpretation by scholars gradually became the general law (*ius commune*) that was to be applied in Italy, southern France, and the Iberian Peninsula, unless differently settled in local statutes or customs, including feudal law (*iura proprio*). Eventually, the Holy Roman Empire (*Sacrum Romanum*

*Imperium*),<sup>[33]</sup> i.e. the political institution that claimed since the ninth century to have inherited the domination of Christianity from the ancient Roman Empire, formally and officially adopted the *ius commune* (reception of Roman law).<sup>[34]</sup>

The traditional date of the reception of Roman law in German countries is 1495, when the *Reichskammergericht*, i.e. the Imperial Chamber Court,

was established in Frankfurt.<sup>[35]</sup>

Emperor Maximilian I (1459-1519) ruled that it should make its own decision 'according to the common laws of the Empire [...] and the fair and honorable individual ordonnances, statutes and customs of the principalities, sovereignties and courts, which are brought before them', including the *glossa* by Accursius and the Commentators' opinions.

Prior to that date, some German scholars had already argued that Roman law had even been formally adopted through an order of

Emperor Lothar von Supplinburg of 1135.<sup>[36]</sup> In 1643, however, Hermann Conring (1606-1681), who was eager to pave the way for the abandonment of Roman law in favor of the native law of German peoples, demonstrated that such proto-reception (Frührezeption) of the former *was* but a legend (the so-called *Lotharische Legende*).<sup>[37]</sup>

Although the *ius commune* was deemed subsidiary to the *iura proprio*, this relationship was reversed in the legal practice of the superior courts across Europe, which were decidedly inclined to latch onto the *ius commune* as a supreme source of law. In fact, the litigant who pled for the application of the *iura proprio* was burdened by the onus of

<sup>56</sup> proving its existence and its content, otherwise the *ius commune* was to be applied (*fundata intentio*).<sup>[38]</sup> Yet in many countries local customs had long remained uncodified and, even if codified, their content could prove obscure or in any controversial event, so that the proof required to apply them was too cumbersome and the way feared to an almost general application of the *ius common*. At any rate, legislation by a state-town or a sovereign was to be interpreted narrowly (*statuta sunt stricte interpretanda*), thus leaving much room for the application of the *ius commune*.<sup>[39]</sup>

In the first book of his *The Old Regime and the Revolution*, Alexis de

Tocqueville (1805-1859) devotes chapter four to 'How Almost All of Europe Had Come to Have Identical Institutions and How These Institutions Fell into Ruin Everywhere'. In particular, in a note relating to this chapter he affirms that 'Roman Law soon ended up by entirely driving out the national law from a large part of legislation, planting its roots even on the ground where it let the national

legislation subsist'.<sup>[40]</sup> The author identifies two grounds for this phenomenon: (i) the prestige enjoyed by the languages and cultures of antiquity; and (ii) the aspiration of the Holy Roman Empire to stand as the continuation of the Roman Empire (thanks to the so-called *translation imperii* ). In addition to the above, the author refers to the fact that Roman law was a law of servitude and, therefore, it would have been particularly apt to uphold the absolute powers of rulers of the time.

In turn, the Catholic Church, which at least from the time of Pope Gregory VII (1173-1185) was also organized as a political institution (see *supra*, ch

2, para 3),<sup>[41]</sup> had been developing a law of its own, which was based on ancient rules (*canones*) and which was later developed through letters of the Popes that formulated decisions (*litterae*

*decretales* ). This law was called **canon law** (or **canonical law**) and, albeit to a lesser extent than civil law, was also based on Roman legal thought.

The main collection of canons was made right before the middle of the twelfth century and, although its real name was that of *Concordia discordantium canonum* , it became universally known as the *Decretum Gratiani* , from the name of the bishop (or ' *antibishop* ') of Chiusi – also a jurist – who drafted the work. It was therefore a private collection, which for the first time gathered a selection of the sources of canon law, accumulated over a thousand years of the Catholic Church's history.

In addition, there was the collection of pontifical *decretales* which Pope Gregory IX (1170?-1241) published in 1234 with the bull *Rex pacificus* and which had been compiled by Saint Raymond of Peñafort. According to a fortunate parallelism, this collection is to the *Decretum Gratiani* what the *Codex Iustinianaeus* is to the *Digestum* .

The *Decretum Gratiani* and the *Decretales* of Pope Gregory IX thus represented the original nucleus of a larger collection of sources of canon law, which was given the epithet of *Corpus iuris canonici* : 'body' of canonical law. A parallel with the aforementioned *Corpus iuris civilis* was thus evidently drawn.

Civil law and canonical law, therefore, shared the same Roman roots and were sensed as the two components of a 'common law' (*ius commune*), which is the matrix of the Western legal tradition

( Roman-canonical law ).<sup>[42]</sup> A full jurist of the Middle Ages was supposed to master both the civil and the canonical law, thus to be learned in both of them ( *doctor utriusque iuris* ).

On this historical ground, still nowadays the title of 'master of the laws' (LLM) is bestowed upon those who graduate in law, whereby the plural usage historically recalls the duality (and complementarity) of civil and canonical law.

The bulk of medieval legal education consisted of Roman law (mostly classical, or at least presumed to be so) as handed down by the Justinian compilation and interpreted by the great scholars at universities: first those of northern Italy; later on also in France and Germany, as well as the Netherlands; but also at Oxford and Cambridge (see *infra*, ch 2, para 4.2). Over time, the *Corpus iuris civilis* (and above all the *Digestum*) was the subject of great works of comment and explanation, which for centuries represented the common basis of learning and teaching law in European universities.<sup>[43]</sup>

Following the model of Bologna, numerous universities were born during the twelfth century in

continental Europe, some of ecclesiastical constitution, others secular. Among the most important, those established in Paris (between 1150 and 1170), Salamanca (1218), Montpellier (1220), and Padua (1222).

In German territories, the first university was erected in Heidelberg (1386), preceded by that of Prague (1348), which, though not on a German territory, was attended by many German students.

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## 4.2. Common law and equity

The Norman conquest of England, traditionally marked by the battle of Hastings (1066), was followed by the development of a new law during the reign of Henry II (1154-1189), which, although coexisting with the previous local customs of the Anglo-Saxons, ruled the whole kingdom and was therefore called the common law. By the middle of the thirteenth century, the common law amounted to a full-fledged legal system, endowed with its own specialist practitioners and its own

<sup>58</sup> technical language and literature.<sup>[44]</sup>

Unlike the continental *ius commune*, the English common law was not based on a fundamental book to be interpreted by scholars and studied at universities but gradually emerged from the functioning of a system of royal jurisdiction, which originally aimed at maintaining 'the king's peace' and at creating an alternative to the seigniorial justice rendered by feudal lords, which was often slow and unsatisfactory. Consequently, the relationship between substantive law and judicial procedure has been the reverse of what is to be found in continental Europe, where substantive law comes to the forefront and procedure follows; indeed, the common law grew 'in the interstices of procedure' (see *infra*, ch 10,

para 1).<sup>[45]</sup>

In fact, if a litigant distrusted local courts or did

not wish to wait for the next visit of itinerant royal justices (known as justices in eyre),<sup>[46]</sup> she could turn to the king, who, by issuing a brief memorandum (*short or writ*), could order that the case be heard. This jurisdiction applied first to criminal cases also involving disputes over the property of land and to other torts and only subsequently (and with some hardship) to mere civil litigation arising from private agreements.

Gradually, three central royal courts (King's Bench, Court of Common Pleas, and Exchequer)

became autonomous.<sup>[47]</sup> They developed a standardized panoply of **forms of action**, which encapsulated each legal claim in a stiff procedural scheme.<sup>[48]</sup>

For each type of controversy admitted to the royal jurisdiction, a new writ was created by the **Royal Chancery**, which was a procedural formula based on a peculiar factual scheme. A case could be brought to the king's judges if and only if it met the factual scheme of one specific writ. This led to a gradual loss of judicial powers of the barons, which finally led to the point that through the 1285 Westminster Statute the creation of writs

was forbidden.<sup>[49]</sup>

Because of the rigid formalism of both the system of writs and some cumbersome procedures, the common law as applied by the royal courts soon came to be characterized by numerous gaps and injustices. Although for different reasons, this

ultimately gave rise to the very same popular discontent that the creation of common law had intended to eliminate. This resulted in even more new appeals to the sovereign, who then had to render justice for each case individually. As it became unrealistic for the king to decide this increasing number of cases one by one, it was the Lord Chancellor and, later on, the Court of Chancery that carried out the task and developed its own jurisdiction (**equity**).<sup>59</sup>

The Lord Chancellor , usually an ecclesiastic who applied and referred to the principles of canon law and, indirectly, of Roman law, could decide *secundum conscientiam* (according to his conscience)

<sup>59</sup> that a case should be removed fromthe courts of common law and decided on equity; he could even reopen a case that had already been decided by those courts, and he was not bound by the precedents of common law.

In order to achieve consistency and therefore predictability in their decisions, equity courts sought to forge and, as far as possible, adhere to **maxims of equity** , which could more or less provide guidance for subsequent rulings (eg 'Equity regards as done what ought to be done', 'Equity will not suffer a wrong to be without a remedy', 'Equity aids the vigilant not the indolent', etc.) (see also *infra* , ch 6, para 3 ).

From its origins in the twelfth century, equity had increasingly expanded to the point of standing as an alternative and competing system to common

law, despite the assertion that *aequitas sequitur legem* (equity follows the law).

This resulted in a strong reaction by common law courts, which were concerned about possibly losing a significant portion of their powers. [51]

The Lord Chancellors had to defend their role as moderators of the rigor of the common law, particularly Thomas More (1477-1535), who was, among other things, sentenced to death for not recognizing the Anglican religious reform, and Francis Bacon (1561-1626). [52]

In the seventeenth century, the conflict fully entered the realm of the political as, during the civil war of 1649 and the revolution of 1688, common law courts had taken sides with Parliament, whereas equity, as exercised by the Lord Chancellor, constituted a typical emanation of the king's powers, and therefore it was difficult to control from a democratic point of view. In an attempt to mark a line between the two jurisdictions, a harsh debate took place between the Lord Chancellor, Thomas Edgerton, first Earl of Ellesmere (1540-1617), and Sir Edward Coke (1522-1634), [53] and it was ended by the decision of King James I, according to which 'equity shall prevail'.

However, this decision foretold radical changes to equity. In fact, it no longer sought to pursue the justice of the single case at hand but transformed itself into a proper legal system, [54] which went on growing separately from the common law, with

each system being administered by a judicial hierarchy of courts on its own. It was only in the late nineteenth century that in most Anglo-American jurisdictions (starting with the US) this dual system was terminated by the legislature (see *infra*, ch 4, para 4).

The great success of the king's jurisdiction drove the English system of common law to develop in parallel to continental civil law. According to a famous analysis, 'while the other nations of Western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing that

<sup>60</sup> history; it was developing a formular system which in the ages that were coming would be the strongest bulwark against Romanism and severe [...] English law from all her sisters'. [55]

Common law barristers were in fact trained at the Inns of Court in London (see *infra*, ch 7, para 4) rather than receiving degrees in canon or civil law at the Universities of Oxford or Cambridge. [56]

The study of Roman law was brought to England in 1149 by the Lombard Roger Vacarius (1120-1200), prior to the establishment of the Universities of Oxford (1167) and Cambridge (1209), where canon law was taught as well.

However, the teaching of canon law was suppressed by King Henry VIII in 1535, due to the Anglican religious reform and the schism with the Catholic Church. [57] From that time,

therefore, the study of Roman law remained the only legal science admitted at English universities.

Despite the fact that several universities had been founded in Scotland (St. Andrews in 1412, Glasgow in 1451, and Edinburgh in 1556), until the middle of the nineteenth century most Scottish students used to move to the continent for their legal studies, especially to the University of

Leiden.<sup>58</sup>

Yet, it must be pointed out that some application of Roman law regularly took place also in England, particularly for subject matters that fell under the competence of ecclesiastical courts and the Court of Admiralty (see *infra*, ch 4, *para 1*). Even more importantly, common law itself (not to mention equity) was by no means immune from the influence of the civilian tradition, whose legal doctrines and institutions were rather continuously imported to England (see *infra*, ch 4, *para 1*).

## 5. The advent of national law (*ius patrium*) and the ideal of its codification

During the seventeenth century, the universalism of the *ius commune* was increasingly challenged by the growing complexity of the interplay between the sources of Roman law (including the medieval *glossae* embodying the *opinio doctorum*) and the many strands of local law (city statutes, feudal norms, local and regional customs, and so on) (see *supra*, ch 2, para 4.1). This development engendered a tremendous lack of legal certainty, which was reflected in the unpredictability of the decisions by the superior courts; an extreme legal particularism was widespread, since in each town a different law was to be applied.

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With regard to the French territory in the seventeenth century, Voltaire (1694-1778) describes the situation of the law in stating that: 'In addition to these forty thousand laws, of which we always quote some random, there are five hundred and forty different customs in France, if we count all the provinces and even villages which are exempt from the main jurisdiction of the kingdom. A man who should travel through France in a post chaise changes the law he is governed by more than he changes horses as has already been said, and a lawyer who will be very learned in his city will be an ignorant

man in the neighbors city.<sup>[59]</sup>

A cure to these shortcomings of the medieval *ius commune* was recognized in the advent of a national law, which could replace the abstract universalism of Roman-canonical law, which for its part was also challenged by the political crisis of the Holy Roman Empire.<sup>[60]</sup>

It was initially in France where the urge for forging a national law was advocated and endorsed by the royal power, also due to the aim of King Louis XIV to achieve a strong political unity of the country.

In opposition to Roman law and drawing on the customary local law rooted and applied in the northern part of the kingdom (*pays de droit coutumier*) (see *infra*, ch 4, para 3.1.1), Charles Dumoulin, also known as Molinaeus (1500 -1566), and Yves Coquille (1523-1603) coined and elaborated on the concept of a *droit commun français*. Through the 1679 edict of Saint-Germain-en-Laye (1679), King Louis XIV eventually introduced university teaching and the professorships of ' *droit français contenu dans les ordonnances et dans les coutumes*'.

The tendency towards a nationalization of private law was combined with that towards its rationalization and simplification that was clearly

affirmed by the great representatives of natural law around the seventeenth century (see *infra*, ch 5, para 2),<sup>[61]</sup> authors who also brought up instances of social and legal reformism linked to the affirmation of the rights to freedom of all men.<sup>[62]</sup>

The initiators of 'early' natural law may be identified in Hugo Grotius (1583-1645) and Johannes Althusius (1563-1638).

One of the most prominent representatives of this doctrine was Samuel vonPufendorf (1632-1694),

<sup>[63]</sup> whose main work, *De iure naturae et gentium*, was published in 1672.

'Late' natural law was dominated by Christian Wolff (1679-1754), who applied to law the 'geometrical method' (*ordo geometricus*) that Baruch Spinoza (1632-1677) had laid down for ethics (see *infra*, ch 5, para

<sup>[64]</sup>).<sup>[64]</sup> Wolff built his system of legal concepts consistently on syllogistic deductions, all of which were to be derived from the highest principles

of natural law.<sup>[65]</sup> The name of Daniel Nettelbladt (1719-1791) may be mentioned as well.

The tenets of natural law, which gained a vast consensus in the countries of Protestant religion, favored the flourishing of a legal science that was purported to 'purge' the Roman-canon law of the

Middle Ages, thus transforming it into a modern law. This new jurisprudence, which was later to be referred to as *usus modernus* (*or hodiernus*)

*pandectarum*, [66] claimed the abandonment of all rules of the medieval *ius commune* that had in the meantime become obsolescent, as well as for a merger of this body of rules with the indigenous law of the German countries.

One of the earliest works that inaugurated the *usus modernus* was the *Introduction to Dutch Jurisprudence* (*Inleidinge tot de Hollandsche reechtsgelerdheid*) by Hugo Grotius (1583-1645).

A text that over centuries constituted a genuine work of reference for academic studies and also for the law in action was found in the *Institutiones* of Arnold Vinnen, or Vinnius (1588-1657). His success was one of the factors leading the University of Leiden to create the first chair of *ius hodiernum*, in 1688, which was held by Johan Voet (1647-1713).

The expression of *usus modernus pandectarum*, however, appeared rather late and spread only following the homonymous work by Samuel Stryck (1640-1710), which was published in 1690.

Subsequently, the works of Adam Struve (1619-1692) and, above all, of Johan Gottlieb Heinecke, or Heineccius (1681-1741), who was also a natural law scholar, were affirmed.

The eighteenth-century Enlightenment, that was strongly imbued with the doctrines of ‘late’ natural law,<sup>[67]</sup> strongly advocated for a codification of national laws, based on the tenets of equal treatment of men, rationality of legislation, and due process.<sup>[68]</sup> The first endeavors of codifying private law happened to be performed in some German states, where political regimes of enlightened absolutism were deeply imbued with an altruistic paternalism.

<sup>63</sup> In Bavaria, Duke Maximilian Joseph III ordained that many codes be drawn up and issued, particularly that of private law in 1756. The *Codex maximilianeus bavaricus civilis* was essentially molded on the *usus modernus pandectarum*.<sup>[69]</sup>

The elaboration of the *Allgemeines Landrecht für die Preussischen Staaten* (ALR) of 1794,<sup>[70]</sup> which was adopted by Prussia, ruled by Frederick the Great (Friedrich II), is largely attributable to one of the great exponents of the natural law school, namely Christian Thomasius (1655-1728) (see *supra* in this para). The ALR remained in force even when, thanks to the political and military skill of Otto von Bismarck (1815-1898), Prussia was to unify all the single German territories into the German Empire (*Deutsches Reich*).

Later on, the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB) of

1811 came to the fore,<sup>[71]</sup> based on Kant's legal and philosophical thought.<sup>[72]</sup> It was preceded by the Martini project of 1794 and the *Westgalizisches Gesetzbuch* of 1797. A deep influence on these legislative achievements was exerted by the works of Christian Wolff (1670-1754) (see *supra* in this para).

Codification of private law (as well as of other areas of law, above all criminal law) rapidly took root on the European continent (see *infra*, ch 4, para 3.1) and culminated first with the *Code civil des Français* (subsequently also named the *Code Napoléon*) (see *infra*, ch 4, para 3.1.1) and then later with the *Bürgerliches Gesetzbuch* (BGB) (see *infra*, ch 4, para 3.1.2).

Both were expressions of an **authoritarian political regime** and the foundation (or re-foundation) of a **strong national state**. For France, it was the Revolution of 1789 first and later on the apotheosis of Napoleon. For Germany, it was the foundation of the German Empire (*Deutsches Reich*), whereby Prussia could unify all the German territories under a unique political regime.

A similar phenomenon occurred in Italy, where the first Civil Code (1865) accompanied the achievement of national unity (proclaimed in 1870); by contrast, the second (1942) was pursued by the fascist regime of the time (see *infra*, ch 4, para 3.1.3).

With regard to common law jurisdictions, it was only towards the mid-eighteenth century that English law began to be studied in a scientific way and taught at universities.

In 1753, the English common law was for the first time lectured on at a university, particularly by William Blackstone (1723-1780) at Oxford. Thanks to the legacy of Charles Viner, in 1758, the first professorship of common law was created in Oxford, inaugurated by Blackstone himself. The Vinerian Professorship of English Law currently still exists.

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<sup>64</sup> Cambridge created its first chair in English Law in 1800, and later on, in 1826, John Austin (see *infra*, ch 5, para 3; ch 6, para 1.1) was elected as Professor of English Law at University College London.

Still in 1883, to mark his appointment as Vinerian Professor at the University of Oxford, Albert Venn Dicey (see *infra*, ch 7, para 1) nevertheless delivered an inaugural lecture titled 'Can English Law be

Taught at the Universities?',<sup>73</sup> where the final question mark is telling of how fragile the academic reputation of national jurisdictions still was.

Starting with Jeremy Bentham (1748-1832) (see *infra*, ch 7, para 3.2), several attempts were carried out to codify common law; whereas they

may have remained completely unsuccessful in the UK, they bore instead some fruit in the US (see *infra*, ch 7, para 3.2).

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## Glossary

## Biographies

## CHAPTER 3

### National and international law

- Statism and nationalism of contemporary Western laws
- The split of national and international law
- Comparative law: its concept, history, and methodology
- Private international law
- Uniform law: the CISG

In opposition to the medieval *ius commune*, which was not the expression of a central authority, national states established their own sovereignty by enacting their own laws. It was thus created a split between domestic law and international law, in which domestic law applies to the State's citizens within its territory, whereas (public) international law governs the relations between states, or between citizens of different states, and is therefore produced through inter-state agreements.

The aim of comparative law is that of 'measuring' similarities and differences between different legal systems. A structuralist methodology of comparative law tends to be opposed to a functionalistic methodology, which, in turn, is either synchronically or diachronically applied. Both methods are predominantly committed to a 'micro-comparison' of single institutes or doctrines, whereas a 'macro-comparison' focuses on the constitutional and institutional features of the different legal systems.

The aim of private international law is that of addressing conflicts of laws arising between different jurisdictions and selecting which of the conflicting laws is applicable to inter-state

cases. Each state issues its own private international law, whose rules concern procedural as well as substantial aspects. Yet, private international law may be brought into uniformity through international conventions, as well as, for the Member States of the EU, through regulations of the latter.

Convergence among legal systems is achieved through tools of uniform law, such as the Vienna Convention on the international sale of goods (CIGS), which are the outcome of extensive comparative studies and accommodate the states' will to facilitate exchanges across national borders. To that end, model laws may be beneficial as well.

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## 1. Statism and nationalism of contemporary Western laws

The historical development of the Western legal tradition came to address and conceptualize (private) law as set out by nation states, each of which exercises sovereign powers first to enact, then to apply its own law. To put it differently, contemporary Western laws tend to be stamped by the stigma of statism and nationalism, which in the last two centuries have been embodied in the codifications of (private) law (see *infra*, ch 4, *para 3.1*).

Paolo Grossi has clearly expressed criticism of 'legal absolutism', which triumphed after the age of the Enlightenment and the rise of the

Jacobean ideal of legislation as the 'will of the nation'. The medieval understanding of law, based on scholarly endeavors by jurists, was thus subverted and replaced by allegiance to the sovereign's will.

From the viewpoint of both laymen and jurists it is now accepted that, since each state creates its own law, any discourse about law is possible only if it refers to a national law, i.e. a law engendered by a state. This view is challenged by international law, whose status as 'proper law' is sometimes

subject to debate (see *infra*, ch 3, para 2).<sup>1</sup>

To a large extent, law thus becomes the outcome of a political decision taken by a sovereign entity, be it an absolute monarch or a democratic parliament (see *infra*, ch 5, para 3). This conception of law has largely been conveyed through the doctrine of legal positivism (see *infra*, ch 5, para 1), which may be said to embody the current conceptualization of Western legal systems.

As a consequence, any scientific or didactic account of law would tend to address a national law. Studying Italian law would mean ascertaining the legislation adopted by the Italian state while creating its own law, and the same would apply to German law, French law, etc. This stance led to an overwhelming nationalism of legal education, which is nowadays the worst threat to the future of law and of legal knowledge. In fact, the future

of law (seeking justice as such), as well as of legal knowledge (seeking truth as such), is severely limited by placing it within any geo-political boundaries.

However, the concept of (private) law as national and state-made is relatively novel, since it only became established about two centuries ago. As such, it is quite revolutionary and marks a tremendous upheaval of the Western legal tradition.

Until the end of the nineteenth century, European law developed based on scholarly and judicial re-interpretation of a corpus of writings by Roman lawyers who had lived in antiquity. This analysis, conducted by more modern judicial scholars, tries to rationalize and adapt these writings to the new features of contemporary society. As a

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<sup>79</sup> consequence, a proper common law (*iuscommune*) of Europe was established and went on flourishing for centuries (see *supra*, ch 2, paras 3-4).

Even though the Holy Roman Empire tended to consider the medieval *ius commune* as its own, it would appear that such law was not issued by the Emperor and, despite some ambiguities in legal historiography,<sup>2</sup> could not be depicted as the territorial legal system of the Empire (see *supra*, ch 2, para 4.1).

The merit of depicting the medieval *ius commune* as 'a spiritual undertaking' ('*a spiritual fact*') may

be ascribed to Francesco Calasso

(1904-1965).<sup>[3]</sup> More recently Paolo Grossi has embarked upon a sharp criticism of any understanding of medieval law of Europe as enacted through the exercise of a sovereign legislative power.<sup>[4]</sup>

In fact, the geographical domain of medieval *ius commune* stretched much further than the territories encompassed within the borders of the Holy Roman Empire, given that it also reached some French *pays de droit écrit* (or *de droit savant*). Furthermore, the application of medieval *ius commune* was based on the premise that Roman law was to be understood not as state law, but either as customary law, or as *ratio scripta*, i.e. a repository of patterns of legal reasoning not bound to historical or national circumstance (see

## 2. The establishment of the Westphalian paradigm: the split of national and international law

The Holy Roman Empire and the Roman Church were not definable as states in a modern sense,<sup>[5]</sup> first of all because they claimed to be universal institutions, whose powers were not confined within a closed territory. They constituted the *Res publica gentium christianarum*, which was deemed to embrace all mankind and to rule all over the world.

To put it as Frederic William Maitland (1850-1906)

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Therefore, the medieval *ius commune* had no territorial basis at all, nor was it attached to the powers of a sovereign state. To a man of the Middle Ages, a discourse about German or French law must have sounded as out of place as speaking today of German or French theology, or Dutch or Greek medicine, and so on.

Yet, the institutional paradigm of the Empire gradually fell to pieces after the Peace of Westphalia, which, in 1648, put an end to the wars of religion which had been inflaming Europe for thirty years. The means to eradicate civil conflicts was found in the emergence of nation states, which replaced the universality of the Empire, and it was thus given a protective shield

in the principle *cuius regio, eius et religio* . The religion adopted by the sovereign would have to be worshiped by his liegemen as well, whether or not they believed in it.

The idea of nation states as a cure for civil conflicts of religion was proposed by a French political philosopher, Jean Bodin (1529-1596), in his *Six livres de la République* (1576), where the concept of state sovereignty is widely expounded.

Passionately and imaginatively, this view was later advocated by Thomas Hobbes (see also *supra* , ch 1, para 1 ) through the rabbinical metaphor of the Leviathan , which gave the title to his masterpiece of political philosophy (1651). The state is seen there as an 'infernal' machinery of decision-making procedures, which replaces the guidance of an absolute truth (of God), of an absolute justice (of law), and so on, with a convention among the citizens.

The abandonment of truth was the price citizens paid for peace. In other words, law was no longer hinged on the rationality of legal reasoning but on the state's political will and sovereign power (see also *supra* ch 2, para 5 ; *infra* , ch 5, para 3 ). The truth, pure and rational, was no longer paramount for the law, replaced instead with the sovereign's will ( *stat pro ratione voluntas* ).

On the other hand, wars ceased to be just or unjust by nature or according to the goals they

pursued, or because they were aimed at making the supposedly true religion triumph over the heretics and the infidels. Wars thus became a competition or a negotiation between nation states, and this negotiation was governed by rules that imposed their mutual legitimacy and their mutual respect (see also *infra*, ch 5, para 4).

During the sixteenth century, the dilemma of defining when a war can be considered 'just' had been the subject of a vast elaboration of political philosophy, which laid the foundations of international law in a modern sense.

The forerunner of this speculation was a Roman Catholic theologian, Francisco de Vitoria (1483-1546), who was the founder of the school of Salamanca's classical thinking, which was deeply imbued with a concept of natural law based on liberty (Second

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<sup>81</sup> Scholasticism).<sup>[6]</sup>

The birth of international law as an autonomous discipline is generally recognized in the *De iure belli* by Alberico Gentili (1552-1608). However, the work that had far greater resonance was certainly *De iure belli ac pacis* by Hugo Grotius, or Huig de Groot (1583-1645).

Francisco de Vitoria, Alberico Gentili, and Hugo Grotius can therefore be considered as the forerunners of international law.

This assumption led to the establishment of the

Westphalian paradigm , characterized by a strict separation between domestic law and international law.

As regards domestic law, the state's sovereignty entitles it to bind its own citizens by enacting legal rules. Law became a product of nation states and, therefore, each of them is hinged on an autonomous system of its sources. Legal nationalism paved the way for the major codifications of private law of the nineteenth century (see *supra* , ch 2, para 5 ).

As regards international law, the state's sovereignty can be voluntarily self-limited by means of agreements with other states.

Subsequently, each contracting state has a duty to enforce the international agreements it has entered into, by changing its domestic law accordingly.

The ancient *ius gentium* , the body of customary rules acknowledged by Romans as applicable to non-citizens, was thus replaced by a *ius publicum europaeum* , a body of rules negotiated by the states, with the aim of binding the contracting states themselves, but not their citizens.

In the political-theological reflection of Carl Schmitt (see *supra* , ch 1, para 2 ) World War I caused the abandonment of the *ius publicum europaeum* , since the development of technology and the unlimited power that it makes available to mankind excludes the possibility that any war

can be dominated and controlled by legal rules. The ancient wars of religion are now revolutionary wars,  
[<sup>7</sup>] namely absolute wars, aimed at the annihilation of the enemy.

Customary law is set apart both at the national and at the international level, although it does not disappear completely but operates in the interstices of law laid down by nation states (for example to interpret it, or to fill its gaps) (see also *infra*, ch 7, paras 3.1-3.2).

Article 38 of the Statute of the International Court of Justice stipulates that international law consists of: 1. international conventions; 2. international custom, as evidence of a general practice accepted as law; 3. the general principles of law recognized by civilized nations, whose mapping was famously undertaken by Rudolph B. Schlesinger (1909-1996).

[<sup>8</sup>]

### 3. Comparative law

#### 3.1. Concept and historical development

The existence of a plurality of legal systems itself constitutes the reason for their comparison. This comparison aims to 'measure' similarities and differences between legal systems. In this regard, one can speak about **comparative law**, although this term may generate the false impression that what is dealt with is a legal system in itself, or a part of it. However, the term 'comparative law' is substantially and qualitatively distinct from that of **foreign law**. Notably, the latter refers to a proper legal system in force in a state other than that being used as the reference, whereas the former constitutes a mere theoretical or conceptual abstraction, which is solely the result of an intellectual and cultural operation of comparison between a national legal system and another (or even more than one).

For example, a German observer may qualify French law as 'foreign', whilst it will obviously not be such for a French person. Differently, 'comparative law' is not the law of either a French or a German national but the intellectual and cultural operation of comparing the two legal systems, to 'measure' how they resemble each other and in how they diverge.

Accordingly, it is appropriate to say that comparative law identifies a method of legal science, which may be embodied in the study and teaching of each national law or be developed on its own as an autonomous field of knowledge.<sup>[9]</sup>

The historical heralding of comparative law goes back to Greek literature of political philosophy, where some great thinkers of the classical period (among them Plato and Aristotle) discussed the rights in force in the various poleis, thus

comparing them (see *supra*, ch 2, para 1).<sup>[10]</sup>

It is obvious that, at the time of the European *ius commune* (see *supra*, ch 2, paras 3-4) given the trend in universalism that characterized it, no particular interest was developed in comparative law, except in specific contexts where it coexisted with some local, particularly rooted, legal systems (as in France). By contrast, the progressive rise of the *ius patrium* (see *supra*, ch 2, para 5) explains why comparative law assumed new importance.

A specific case occurred in Germany where, due to Napoleon's military conquests, the French code that had been enacted in the meantime (see *infra*, ch 4, para 3.1.1) became effective in the Rhineland and was substantially implemented in the *Landrecht für das Großherzogthum Baden* of 1809. Therefore, law students at the famous university of Heidelberg, which is located in Baden, had to study French law. This

led two of its professors, namely Karl Salomo Zachariä (von Lingenthal) (1769-1843) and Carl Joseph Anton Mittermaier (1787-1867), to found a journal for the review of comparative law in 1829, the *Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*, which may historically be considered as the first-ever on the subject.

For similar reasons, Zachariä wrote and published a French private law manual in German for his students, namely the *Handbuch des Französischen Zivilrechts* (the first edition of which dates back to 1808 but was then republished until the fourth edition in 1837), which had a peculiar fairness. Translated into French by Charles Aubry and Charles Frédéric Rau (the first edition was published between 1839 and 1844), it was then republished in several editions (more recently edited by Carl Crome) and became an influential text on the development of French law, which was influenced by the German categories Zachariä had unknowingly used.

The great comparative tradition of the University of Heidelberg is still attested by the vitality of its prestigious *Institut für ausländisches und internationales Privat- und Wirtschaftsrecht*.

Furthermore, significant comparative analysis preceded the

unification of commercial law that initially occurred in Prussia (see *infra*, ch 7, para 2). From 1871, once the *Deutsches Reich* was established, the unification of different legal systems extended to private law (see *infra*, ch 4, para 3.1.2), law of civil procedure, law of bankruptcy, law of judicature (court system), and criminal law.<sup>[11]</sup>

In France, in 1834 Jean Jacques Gaspard Foelix (1791-1853) founded the *Revue étrangère de législation de France*, whose title, perhaps not particularly appropriate, was changed several times, until publication ceased in 1850.<sup>[12]</sup> At that same time, the first chairs of comparative law were created at several French Universities. In 1869, the prestigious *Société de législation comparée* (which still exists) was established, and started publishing the *Revue internationale de droit comparé* (also still active).

In England, in 1869 Henry Sumner Maine was appointed to the Oxford Chair of Historical and Comparative Jurisprudence.

From a scholarly perspective, a decisive role was played by the Italian lawyer **Emerico Amari** (1810-1870), who can therefore be considered as the true founder of comparative law in the modern sense.<sup>[13]</sup> His *Critica e storia di una scienza delle legislazioni comparate* (1857) found great resonance

not only in Italy, but also in the rest of Europe.

However, the historical birth of comparative law, from which it has acquired its current physiognomy and has also begun to develop its own methodological awareness, is usually identified in the *Congrès international de droit comparé*,<sup>[14]</sup> which, under the auspices of the *Société de législation comparée*, was held in Paris from 31 July to 4 August 1900 during the great World Exhibition celebrating the triumph of the progressive and positivist spirit of the *belle époque*.<sup>84</sup>

The authors of this conference were Édouard Lambert (1866-1947) and Raymond Saleilles (1855-1912),<sup>[15]</sup> who particularly contributed to the methodology of comparative law as a science.<sup>[16]</sup> In 1921, Lambert founded the first French institute of comparative law at the University of Lyon.<sup>[17]</sup>

One of the main fathers of comparative law was Ernst Rabel (1874-1955), who clearly defined the scope and the methods of this field of knowledge and laid the foundations for its further development in Europe.<sup>[18]</sup> Rabel was a member of the mixed Italian-German court of arbitration that was charged with the application of the treaty of Versailles at the end of World War I.

Specifically, regarding the interpretation of article X of the Treaty, which regulated the pre-war legal relationships between nationals of combatant states, Rabel confronted the issue that national

laws may differently qualify the same legal institution, so that, when they collide, the application of international private law proves troublesome. He came to the conclusion that, contrary to a widespread assumption at the time, such qualification should not be based on the national law of the court adjudicating the case (*lex fori*) but on a comparative assessment (see *infra*, ch 3, para 5).<sup>[19]</sup>

Thanks to the work of Rabel, in 1926 Kaiser-Wilhelm-Gesellschaft founded the Kaiser-Wilhelm Institute of Foreign and International Private Law in Berlin, which later on moved to Hamburg and became the current Max-Planck-Institut für ausländisches und internationales *Privatrecht*.

Once again at Rabel's instigation, notwithstanding the war, in 1916, an Institute for Comparative Law was founded at the University of Munich and was followed by many others, including that of Heidelberg which has already been mentioned.

In Italy , it was at Bocconi University, in 1924, that the first *Institute of Comparative Commercial Law* was established, upon the initiative of Mario Rotondi (1900-1984).

The path was subsequently followed by the *Institute of Legislative Studies* , which Salvatore Galgano (1887-1965) created at Rome University La

Sapienza in 1927.

### 3.2. Aims and methods

As regards the methods of comparative law, firstly it must be stated that the mere recognition or display of one or more foreign legal systems may constitute a preliminary effort but does not in itself accomplish any legal comparative analysis.

[<sup>20</sup>]

To this end, it is necessary to proceed with a 'measurement' (appraisal) of the similarities and differences between the laws considered, although it is not necessary to express a value judgment about what system should be

considered as 'the best'. [<sup>21</sup>]

Historically, the modern affirmation of comparative law was motivated by the intent to create a *droit commun de l'humanité*. [<sup>22</sup>] Although they have not in themselves been contested as illegitimate, aspirations of this kind have been derided as manifestations of a utopian and good-

natured spirit. [<sup>23</sup>] It has instead been affirmed that, as can also be said of any other science, the primary and inalienable task of comparative law is to gain knowledge on a specific subject matter. [<sup>24</sup>]

The manifesto of the *Circolo di Trento*, which gathered a number of Italian comparatists around Rodolfo Sacco, begins with the following thesis: 'Comparative law, understood as a

science, necessarily aims at a better understanding of legal data. Further tasks, such as the improvement of law or its interpretation, are worthy of the greatest consideration but, nevertheless, are only secondary ends of comparative legal research'.

[<sup>25</sup>]

From a practical point of view, however, some advantages are to be highlighted, which can also be seen as **indirect benefits of comparative law**. In particular, comparative law may serve: 1) as an aid to the legislator; 2) as a tool of construction of national or international law; 3) as a subject to be taught and studied at universities; 4) as an incentive and a guide to uniform existing laws; 5) as a driver of a European law as such.<sup>[<sup>26</sup>]</sup>

A core issue of the comparative law method has been the quest for a criterion by which to measure similarities and differences between the legal systems under scrutiny. In fact, such a comparison is possible only if it takes place on the basis of a common denominator between the legal systems under consideration, which may validly constitute the criterion of their comparison (*tertium comparationis*).<sup>[<sup>27</sup>]</sup>

According to certain legal scholars, comparative law is easier with regard to the areas of private law which are more 'apolitical', such as contracts and obligations, whereas family and succession laws present a greater degree of inhomogeneity

among them.<sup>[28]</sup> Similar considerations may apply to some areas of constitutional law.<sup>[29]</sup>

However, it has been shown that succession law also lends itself to comparison.<sup>[30]</sup> On the other hand, as regards family law, it is sufficient to note that, in recent times, it has been possible to compile a complete collection of principles that bring together and formalize the common European law in this area (see *infra*, ch 8, paras 2.1 and 2.3), so that even in this area of private law, comparison is certainly possible.<sup>[31]</sup>

Overall, it is worth pointing out that comparative law is generally characterized by an anti-dogmatic, or even anti-conceptual, approach. In its most reasonable and intrinsically useful form, comparative analysis mistrusts native jurists, who are implicitly 'accused' of not being the best judges with regard to their own national legal system, due to a significant level of conditioning and biases of various kinds to put it in picturesque terms, 'in their explorations on foreign territory comparatists may come upon natives lying in wait with spears'.<sup>[32]</sup>

In this regard, there is an analogy between comparative law and the Freudian discovery of the unconscious, or the Marxian dialectical laws of capitalism, or even the Nietzschean death of God and nihilism. In all these philosophical theories, the basic concepts can be expressed in

terms of a demystification and 'awareness' of a further truth that is veiled or unknown, mainly to those who are directly involved and conditioned by it.

On a methodological level, two approaches to comparative law can be identified, which are variously intertwined, and both can be traced back to endeavors undertaken in Germany by the Max Planck Society.

The first of them can be defined as **functionalist approach**. It was paradigmatically exposed and, above all, fully applied, in the famous handbook by Konrad Zweigert (1911-1996) and Hein Kötz.

[33] Along their dictum, '[i]ncomparables cannot be usefully compared and in law the only things which are comparable are those which fulfil the same function'. [34] It means that the *tertium comparationis* should be determined by the function on which practical problems are resolved, independently of the conceptual or dogmatic structure of such solutions.

The second address can be defined as **historical-comparatist approach** and may be summarized through the formula coined by Gino Gorla (1906-1992): 'comparison involves history'. [35]

This method, which refers the *tertium comparationis* back to the common Roman heritage of the comparable legal systems, [36] has been most notably adopted and developed by Reinhard Zimmermann. His masterpiece, *The Law of Obligations*, is an overall exposition of the

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historical development of the civilian tradition up to its codification in continental Europe.<sup>[37]</sup> This achievement is rooted in the great works of German historians of European law such as Helmut Coing (1912-2000), Franz Wieacker (1908-1994), and formerly Paul Koschaker (1879-1951).<sup>[38]</sup>

According to Alan Watson (1933-2018), Western legal systems as a whole is the result of an overall ‘legal transplant’ of Roman law. Therefore, a real juridical comparison would be impossible if not done in terms of a history of law (or of its tradition).

On the other hand, the method developed by Rodolfo Sacco, which focuses on the theory of **dissociation of legal formants**, can be qualified as ‘structuralist’.<sup>[39]</sup> According to this conception of comparative law, there could be a ‘disharmony’ between the three components that form the legal matrix, ie the legislature, the judiciary (judge-made-law) and scholars’ opinion. In particular, it is possible that a legislative text does not correspond to the operational rule applied by jurisprudence, because, for example, judges interpret it from the perspective of Roman law or foreign law. It is also possible that a scholar may give an inaccurate or unfaithful representation of her own national law.<sup>[40]</sup>

The dissociation of legal formants may illuminate the fate of **legal transplants**,<sup>[41]</sup> that occur when, due to a wide range of possible reasons, a piece of

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legislation of one country was implemented more or less uncritically in another. Inflexibilities or ‘ground-in’ assumptions by legal scholarship and the judge-made law of the recipient country, may in fact cause a rejection crisis in that country, thus frustrating their purpose and degenerating into real legal irritants.<sup>[42]</sup>

All the methods that have been described and examined thus far have a **micro-comparison** focus, namely a comparison between the legal systems based on the operational solutions that they give to the individual practical problems that must be addressed and resolved by the law. An opposite methodology is centred on **macro-comparison**, which compares national laws on the basis of their different constitutional and institutional features, if not on the basis of the legal mentality that animates the jurists who belong to it.<sup>[43]</sup>

In his masterpiece *De l'esprit des lois* (1748), the Baron de Montesquieu, facing the problem of how to compare two different national laws, observed that ‘to determine which of those systems is most agreeable to reason, we must take them each as a whole and compare them in their entirety’.<sup>[44]</sup>

A staple of macro-comparison is constituted by the classification of national laws and above all by gathering them into **families**, ie groups of national laws that are connected by a number of

<sup>89</sup> characterizing features.<sup>[45]</sup>

The idea of classifying national legal systems in families seems to have been formulated for the first time by Gottfried Wilhelm von Leibniz (1646-1716) in his work *Nova Methodus Discendae Docendaeque Iurisprudentiae* of 1667.

In the modern era, one of the first attempts in this sense was made by Adhémar Esmein (1848-1913) on the occasion of the famous, and already previously mentioned comparative convention of 1900.<sup>[46]</sup> During the twentieth century, the work of René David (1906-1990), especially *Les grands systèmes de droit contemporains*, greatly influenced the proposed theory of families of legal systems and its application.<sup>[47]</sup>

The identification of certain characteristic elements, which reflect the style of each national law and make them immediately recognizable,<sup>[48]</sup> is rather controversial.<sup>[49]</sup> Actually, even the recognition and classification of these legal families can vary from one author to the other.

A major distinction is that between **civil law** and **common law jurisdictions** (see *supra*, ch 2, para 4.2; *infra*, ch 4, paras 2-4); furthermore, some **mixed jurisdictions** seem to occupy an intermediate position. Within civil law jurisdictions, a sub-division is sometimes made between Roman laws (France, Italy, Spain,

Portugal and their former colonies) and  
**Germanic laws** (Germany, Austria, Switzerland).  
Furthermore, the **Nordic laws** (Scandinavian and  
Baltic countries) are sometimes considered as  
having peculiar traits, which make them a group  
on their own.<sup>**50**</sup>

## 4. Private international law

The existence of a plurality of autonomous jurisdictions itself brings with the possibility of a **conflict of laws**, when the same set of facts connects with more than one national law.

Suppose a contract has been concluded between a French and a German party and that neither of them performs. If the German party intends to sue the other, it is quite possible that the claimant will bring the case to a German court (ie in the claimant's own country) and ask for German law to be applied. Conversely, however, the other party may object and attempt to bring the case before a French court (ie of the defendant's own country) and have French law applied. A potential conflict of jurisdictions thus arises, which involves both the procedural dimension (ie the forum, the proceedings of the trial, etc.) and the substantial dimension of law (ie the legal

<sup>90</sup> provisions applicable regarding breach of contract, damages, etc.). The first court petitioned therefore has to make a decision whether or not it is competent for the case and, provided that it is, which national law is to be applied. If, to take our example, the contract was signed in Italy and furthermore its subject matter consists of a parcel of land which is found in the UK, the possibilities of conflict between national laws multiply. A selection between the conflicting laws is therefore necessary.

A choice of law must then be accomplished. Therefore, each jurisdiction must provide for rules purported and designed to carry out this very specific function, to make a choice between conflicting national laws ( **conflict rules** ). These are secondary rules (see *infra* , ch 6, para 2.1 ), because they do not set forth the procedural and substantive solutions to be applied in a case, but simply sort out which of the several legal systems involved is competent to rule it. The choice is made on the basis of a **connecting factor** among those at stake, that is declared by conflict rules as prevailing upon the others (for example in the situation mentioned above, if the applicable conflict rules resolve the conflict of laws on the basis of the national territory in which a plot of land is found , then the law of the United

Kingdom will apply to the case). [51] It is also possible that different elements of the same case are connected to different national laws ( *dépeçage* ), thus bringing these laws into co-existence (in our example, the capacity of the contracting parties might be governed by their national laws, whilst the contract itself could be governed by another).

All rules of this sort are contained in a branch of the law which is traditionally called **private international law** . Despite the terminology, private international law is not international as to its sources, with each legal system providing its own; it is however international in its content,

dealing with cross-border cases.

From a historical viewpoint, the necessity of private international law arose long before the creation of national laws and was specifically addressed in France during the sixteenth century, where a high number of customary laws, some of them being broader (*coutumes générales*) and *some* more local (*coutumes locales*), overlapped and thus raised complex questions with regard to conflicts.<sup>[52]</sup>

Charles Dumoulin, or Molinaeus (1500-1566), and, even more so, Bertrand d'Argentré (1519-1590) are to be counted among the scholars who contributed the most to developing the coordination of different French customary laws.

The first written arrangement of private international law is found in the *preliminary* provisions, which were set out in the preface of Italian *Civil Code* of 1865. They were largely due to the work of Pasquale

Stanislao Mancini (1817-1888).<sup>[53]</sup>

The term 'private international law' was coined by the US-American judge and scholar Joseph Story (1779-1845) in his *Commentaries on the Conflict of Laws* (1834) (see also *infra*, ch 7, para 4).

Private international law may, in turn, be

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subdivided into a procedural part (which court is competent to hear the case and which law governs the proceedings brought before the court) and a substantial part (which law regulates the rights and duties of the parties and decides how the case is to be adjudicated). In fact, it is very possible that a national court decides that while it has jurisdiction to hear the case, the substantive law to be applied is not that of the forum (*lex fori*),

but that of another country (*renvoi*)<sup>55</sup>

(returning to our example above, conflict rules might recognize the jurisdiction of the court first petitioned by one of the party, either the German or the French, that for said reason, however, will have to apply the substantive law of the UK to adjudicate the case).

Since private international law depends on individual national law, the question of conflicts between national rules of conflict paradoxically arises. Just as national laws may conflict on a contract or tort, etc., they may be conflicting as well as to their private international law.

This explains the tendency to uniform private international law by means of treaties between nations. In this regard, international bodies such as the Hague Conference on Private International Law have played an important role by elaborating the **Principles of Choice of Law in International Commercial Contracts** in 2015.

Since the 1990s, the private international law of the Member States of the EU has been mostly

unified through regulations of the latter, regarding both its procedural and substantial dimensions. Therefore, it may be said that all Member States now apply the same rules of private international law (see *infra*, ch 8, para 1.5.2).

## 5. Uniform law

Uniform law comes into existence when many states intend to have identical rules in their own legal systems and, at that end, each of them enacts the same legislative provisions.<sup>[56]</sup>

Uniform legislation, however, does not necessarily result in uniform law, since the interpretation and application of the former have to be carried out by national judicatures. Therefore, if they adopt the criteria of interpretation provided by their own legal systems, which may obviously be divergent, then the risk is apparent that the outcomes are divergent as well, thus frustrating the aim of uniformity of law. As historically suggested by the studies conducted by Ernst Rabel on the subject (see *supra*, ch 3, para 3.1), the goal of uniformity of law may be achieved solely if uniform legislation is interpreted on the basis of a comparative analysis of the legal systems.<sup>[57]</sup>

This is the reason why article 7(1) CISG (see *infra* in this para) sets forth that: 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'.

General rules for interpretation of international treaties of rules are set out in sections 31-33 of the 1969

Vienna Convention on the Law of  
Treatises.<sup>[58]</sup>

Since the end of the nineteenth century, international standardization has progressed in many areas of private law, especially in the field of commercial law, trade and labor law, intellectual and industrial property law.

The instruments (or sources) of uniform law are either: 1. International conventions, that oblige states applying them to change their own legal systems accordingly; 2. Model laws, that, although not binding, command a wide consensus and, therefore, are voluntarily mirrored by national legislators. The content and wording of both instruments are often drawn up by international agencies or scientific societies that conduct preliminary studies of comparative law.<sup>[59]</sup>

Two of the most important are the *Institut international pour l'unification du droit privé* ( UNIDROIT ),<sup>[60]</sup> established in 1926 by the League of Nations and re-established in 1940 on the basis of a multilateral agreement, and the United Nations Commission on International Trade Law ( UNCITRAL ), established in 1966 by the United Nations Organization.

The establishment of the UNIDROIT was due to the Italian Vittorio Scialoja and the institute is still based in Rome. Since its inception, 63 states have become

members.

Its aims include:

- 'Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field';<sup>[61]</sup>

- 'Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international

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trade'.<sup>[62]</sup>

One of the most successful instances of uniform law is that of the **United Nations Convention on the International Sale of Goods (CISG)** of 1980, also known as the Vienna Convention on sales.

<sup>[63]</sup> It applies automatically to most international contracts of sale of goods between businesses (art. 1 CISG), unless excluded by the contracting parties (art. 6 CISG).

The CISG replaced two previous treaties concluded in 1964: the Convention on Uniform law on the formation of contracts for the International Sales of Goods (ULF) and the Convention on Uniform law on the International Sale of Goods

(ULIS). The content of the CISG largely drew on the comparative law studies contained in the two volumes of *Das Recht des Warenkaufs*

by Ernst Rabel,<sup>64</sup> who had personally contributed to the drafting of the ULF and ULIS (see also *supra*, ch 3, para 3.1).

In the US, the push for a uniform commercial law resulted in the adoption of the Uniform Commercial Code (UCC) in 1952 (see *infra*, ch 7, para 2),<sup>65</sup> on the basis of a major contribution from the American Law Institute (ALI).

The main drafter of the UCC was Karl N. Llewellyn, one of the leading pioneers of the legal realism that developed in the American legal tradition in the first half of the twentieth century (see *infra*, ch 7, para 4).

The UCC provides an optional model of legislation that is drafted using the restatement technique; namely, it is not binding upon individual states, which are free to adopt it and incorporate it into their jurisdiction. Despite its optional character, slightly amended, it was adopted (or partly adopted) across all of fifty states, as well as the main American territories (eg Puerto Rico).

ALI's Restatements of Law are uniform law models based on case

law of the individual states. Some of them have been published in a third edition (those on unfair competition and tort). Others remain at the second edition (as the one on contracts). Work on a fourth edition is underway, but currently none of the planned volumes have been

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published.<sup>66</sup>

## Glossary

## Biographies

## CHAPTER 4

### Civil law and common law jurisdictions

- The legacy of Roman law in Europe
- The division between civil law and common law traditions
- The national codifications of private law between nineteenth and twentieth centuries
- The mixed jurisdictions

Legal systems in continental Europe rest upon Roman Law and have been influenced by the medieval and pre-modern *ius commune*. The common law was initially cultivated in England, being originally born as autochthonous. Later, it flourished through its application in the former colonies of England; however, it has never been isolated from the continental legal culture. Moreover, a high degree of compatibility (and to some extent even uniformity) between English law and other European national legal systems has been achieved by EU law, as well as by the judiciary of the ECHR and on the basis of the Human Rights Act 1998.

Following the entry into force of the *Civil Code* (1806), French legal culture was pervaded by positivism and nationalism, a trend that was reflected by the predominant exegetical interpretation approach (*école de l'exégèse*). It was only at the beginning of the twentieth century that the exegetical attitude of the doctrine was increasingly mitigated by a new method boosting sociology and legal comparison and promoting the creative role of jurisprudence.

Former Latin-American colonies of European countries, after gaining their independence, evolved their civil codes, which had mainly

relied on the French model, or even revised the entire structure completely, thereby bestowing a distinctive character to their respective legal systems.

The codification process of the German *Bürgerliches Gesetzbuch* (1874-1896) was shaped by the dogmatism of the Pandectistic School, which drew on the concept of 'contemporary Roman law' advocated for by Friedrich Carl von Savigny. The particularly distinctive feature of the BGB is its 'General Part', referring to a system of abstract legal concepts and definitions in the first book.

The Italian *Civil Code* took up ideas from both the French and German Civil Codes and endured through the political era of fascism. Despite the last circumstance, it wholly embodies the liberal culture of its drafters, thus consistently rejecting the authoritarian or nationalistic culture of the political regime. It was historically the first code to comprise both civil law in a strict sense and commercial law, thus amounting to a unique code of private law as such.

Unlike civil law, common law is traditionally not molded by statutory law but formed by case law (precedents). However, recent developments have attributed an increasing importance to statutory law. The original dualism between common law and equity, which mirrored two autonomous judicial hierarchies, was overcome towards the end of the nineteenth century, thereby ending a period of considerable complication in the overlapping applicability of the two systems.

Where political and sociological influences have intermingled in the past, jurisdictions often evolved into a combination of both, including common and civil law features, eg on Malta, Cyprus, or in Israel (so-called mixed jurisdictions).

## 1. The legacy of Roman law in Europe

The legacy of Roman law is generally acknowledged in continental European countries (and their former colonies), to the extent that they may be depicted as having a **contemporary Roman law**. Although it seems like a slight exaggeration, a notable source wrote that 'a law student of the time of Justinian, transported to the twentieth century, would find little to wonder at in the civil codes of modern Europe'.<sup>[1]</sup>

The jurisdictions of continental Europe can be all included in the family of **civil law** (see *supra*, ch 3, para 3.2; *infra*, ch 4, para 3), which is characterized as resting upon the medieval and pre-modern *ius commune* molded by Roman-canonical law (see *supra*, ch 2, para 4.1). This became embedded into the civilian tradition, which formed the basis of the legal unity of (most of) Western Europe from the Middle Ages to the French Revolution.

On the contrary, England developed a truly autochthonous law, called **common law** (see *supra*, ch 2, para 4.2),<sup>[2]</sup> which was later on brought to its former colonies (subsequently, members of the Commonwealth); therefore, despite showing a certain number of unique features,<sup>[3]</sup> all these

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<sup>111</sup> legal systems share an extensive bulk of commonalities and can be included in one family (see *supra*, ch 3, para 3.2; *infra*, ch 4, para 4).

Despite the undeniable originality of common law (see *supra*, ch 2, para 4.2), however, English law has never been fully cut off from continental legal culture and the imprint of Roman law is clearly visible throughout its overall historical development.<sup>[4]</sup>

'Since the twelfth century the Civil Law has penetrated England and, in spite of the fact that it has been driven out, it has never entirely disappeared from English law. Roman thought, which could ultimately be identified with continental thought, was not excluded, however independent

English law may be.<sup>[5]</sup>

The incorporation of Roman law into England began with Ranulf de Glanvill (1112-1190), who served as Chief Justiciar of England under King Henry II (1154-1189). He is thought to have authored a famous treatise on the law applied by the king's court, *Tractatus de legibus et*

*consuetudinis regni Angliae*;<sup>[6]</sup>

this work appeared only in the thirteenth century, and in some versions bears the name of Henry of

Bracton (1210-1268).<sup>[7]</sup>

Elements of Roman-canon law were present in the law applied by many English courts where civil lawyers were practicing. They were educated in

Roman and canon law at the universities of Oxford and Cambridge and, since the sixteenth century, trained in the Doctor's Common (or College of Civilians), an association parallel to the Inns of Court of the common lawyers (see *infra*, ch 7, para 4).<sup>[8]</sup>

Until 1731, except for an interval in the 1650s, the official language of the common law courts was Latin, as well as that of the writers who commented upon them. The traditional language of English law still includes many Latin terms: *habeas corpus*, *certiorari*, *dicta*, *nisi prius*, etc. At an unknown date, but definitely before 1250, French, the language of the Norman conquerors, began to be used in the King's courts. Still nowadays, when of course English is used, some 'legal French' has survived in common law parlance (for example, plaintiffs, defendant, manor, felony).<sup>[9]</sup>

Up to the time of the Reformation of Henry VIII, ecclesiastical courts were responsible for important matters like marriage and succession law but also defamation and breach of contract (

*laesio fidei*).<sup>[10]</sup> They applied canon law (see *supra*, ch 2, para 4.1),<sup>[11]</sup> which deeply affected the

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<sup>112</sup> historical development of the equity system as well, also due to the fact that up to the middle of the sixteenth century the Lord Chancellors were

clergymen (see *supra*, ch 2, para 4.2).<sup>[12]</sup>

Furthermore, the Court of Admiralty applied Roman law in maritime disputes, as well as, at least during one stage of its history, in all commercial contracts.<sup>[13]</sup>

For instance, the Court of Admiralty applied the principles of Roman *negotiorum gestio* to adjudicate cases of salvage, as well as the connected *lex Rhodia de iactu*.<sup>[14]</sup>

Since the eighteenth century, commercial law was modernized in England through the import of doctrines and legal institutions which had been developing on the continent (see *infra*, ch 7, para 2). William Murray (1705-1793), first Earl of Mansfield, played a major role in this process while serving as Chief Justice of the King's Bench.  
[15]

One of the most ambitious purposes of Lord Mansfield was to get English law aligned with the Roman principle of good faith (see *infra*, ch 6, para 3; ch 7, para 2).<sup>[16]</sup> He applied this doctrine to insurance contracts, which he deemed as based on the utmost good faith (*uberrimae fidei*), '[i]nsurance is a contract upon speculation [...]. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured

only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist [...]. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and

his believing the contrary.<sup>[17]</sup>

Actually, even legal institutions which are deemed as quintessentially English, like trust or the doctrine of consideration in contract law, initially developed as offshoots of continental legal science.<sup>[18]</sup>

## 2. The division between civil law and common law traditions

A further analysis of the history of English common law, aside from certain shared aspects of history, confirms that while its separation from civil law is undeniable, it is smaller than was

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<sup>113</sup> thought in the past.<sup>[19]</sup>

As already mentioned, the dialogue between jurists and the circulation of ideas between civil law and common law have been remarkable over the course of their respective historical evolution, as has the influence undoubtedly exercised over them by Roman law, albeit in a differentiated manner.<sup>[20]</sup>

It is also to be noted that over the course of the past two centuries, English common law has been characterized by an increasingly intense theoretical and conceptual elaboration, so that its traditional empiricism and casuistic approach have been mitigated, making it more similar to

civil law.<sup>[21]</sup> English legal scholars have seen their importance significantly increase and adopted a comparative approach when it was deemed useful, importing legal categories and practical solutions from the civil law.

An example of how the two legal traditions have moved towards one another thanks to the influence of

Roman law and comparative methodology can be seen in the works of Peter Birks (1941-2004) on unjust enrichment.<sup>[22]</sup>

Moreover, one must also bear in mind that, although now terminated (see *infra*, ch 8, para 1), the participation of the UK in the European Union has profoundly affected English law: EEC/EC/EU founding Treaties, directives and regulations, as well as the case law of the ECJ have, in fact, made its contents more similar to those of civil law, particularly in some crucial areas of private law (like contract law). Even in the aftermath of the UK's withdrawal from the EU, this heritage of European legislation and judicature has been 'retained' in the UK's legal system, becoming domestic law (see *infra*, ch 8, para 1).

This is also a reason for the significant increase in the influence of statutory law in comparison with traditional case law,<sup>[23]</sup> which still continues to prevail and to be a distinctive element of common law (see *infra*, ch 7, para 3.2).<sup>[24]</sup>

Somehow similarly, albeit to a lesser extent, the ECHR forced English law to achieve a further degree of compatibility, if not of uniformity, with the other national legal systems of Europe. In fact, section 3(1) of the Human Rights Act 1998 stipulates that: 'So far as it is possible, primary legislation and subordinate legislation must be

read and given effect in a way which is compatible  
<sup>114</sup> with the Convention rights'.

Based on this, it has therefore been remarked that the distinction between civil law and common law

ought now to have been superseded.<sup>25</sup> This conclusion may still appear to be excessive, however, it is probably less unrealistic than one might think, considering that the divergences between the two legal traditions are ultimately no greater than some of those which can be found within the family of civil law jurisdictions.

Ultimately, it has been depicted as a difference in style of reasoning, which should be deemed to be not substantial.<sup>26</sup>

### 3. Civil law jurisdictions

As already pointed out, the civil law family encompasses the jurisdictions of continental Europe. It also includes the jurisdictions of the former Spanish, Portuguese, French, and Dutch colonies, for example, in Latin America.

One of the key features of civil law jurisdictions is that they have fully implemented the **doctrine of separation of powers**, the origins and genesis of which are generally traced to the French Enlightenment political philosopher Baron de Montesquieu (1689-1755). In his masterpiece, *De l'esprit des lois* (1748), he clearly advocated a division of political power into three lines; namely, a legislature (entrusted to the Parliament), an executive (entrusted to the government and the rest of the administration), and a judiciary (entrusted to courts).

According to this doctrine, which is also known as the *trias politica* principle, courts are supposed to be 'only the mouth that pronounces the words of the law, inanimate beings that are not able to modify either its force or its rigor', as Montesquieu himself wrote. Legislative power is in the hands of the Parliament, which is the only state organ holding the power to adopt new legal rules or to change or repeal the existing ones.

Consequently, civil law jurisdictions are usually characterized by the prevalence of statutory law

as a source of law, namely for the central role attributed to the civil code as the systematic foundation of private law.<sup>[27]</sup> Legal scholars have traditionally served as a guide in interpreting statutes, thus significantly influencing case law (see *infra*, ch 7, para 3.1).

The forerunner of all contemporary civil codes is that of France, the *Code civil des Français*, enacted in 1804 on the order of Napoleon in 1806, and, after he styled himself as Emperor, re-named as

<sup>115</sup> *Code Napoléon* (see *infra*, ch 4, para 3.1.1).

The enactment of the French Civil Code was a historical event of extraordinary importance, because it paved the way for a wave of major national codifications, which condemned the *ius commune* to death, by definitively replacing it.

In fact, as the other main nations of continental Europe gradually came to establish themselves as many single states, generally through a process of unification of several smaller political entities which pre-existed at a regional level, they mostly followed the French example and enacted their own civil codes. Instead of a universal law, based on an inner rationality and developed through the conjunction between the sources of Roman law and the legal wisdom of legal commentators, the above-mentioned *ius commune*, there was from then on a French, a German, an Italian law, and so on, each of them being based on the sovereignty of a single, nation state and enacted through a political decision of its own Parliament.

In specific contexts, albeit inevitably quite limited or peculiar from a historical point of view, the application of a pure *ius commune* is still to be found, such as in the case of the Republic of San Marino.

A significant phenomenon is the fact that Roman-Dutch law has survived in certain former Dutch colonies, despite the fact that in the Netherlands itself it was replaced in 1809 by the *Code Napoléon* (and subsequently by a national civil code). Roman-Dutch law refers to the *usus modernus pandectarum* specifically developed by the great Dutch jurists starting from the sixteenth century.<sup>[28]</sup> Such law is still applied in South Africa as well

(see *infra*, ch 4, para 5).<sup>[29]</sup>

Even outside Europe, civil codes soon became the identity charters of nation states, generally accompanying their establishment. Particularly, as soon as Latin-American colonies of European countries one by one achieved their independence from their respective homelands, thus becoming independent states, they each enacted civil codes; most of these pieces of legislation are closely based on the French model,<sup>[30]</sup> but in the last decades they have been intensively reformed or even replaced in most countries of Latin America, thus gaining an increasingly original character.



### 3.1. National codifications of private law between nineteenth and twentieth centuries

#### 3.1.1. The *Code civil des Français* (or *Code Napoléon*)

The doctrinal acknowledgment of a *droit commun français* dates back to the sixteenth century (see *supra*, ch 2, para 5) and gained further ground thanks to the legislative activism of Louis XIV, the *Roi Soleil* (1638-1715). Towards the end of the eighteenth century, the ideal of a national law was decidedly embraced by the French Revolution, thus leading to a turn in the legal history of Europe, whereby the medieval *ius commune* was dismissed and replaced with a national law.

The first purpose of this change was of a political nature, aimed at overcoming the feudal law identified as the juridical counterpart of the *ancien régime* which had been disrupted by the revolution. Instead of the mess of local and regional laws binding people, Enlightenment thought had affirmed the ideal of a unique law, intelligible to all men, easily accessible and clearly understandable. Furthermore, the idea was to depart from the Catholic religion and to enact a secular law, stipulated and administrated by the state. This secularization of private law was particularly important with regard to marriage, which was turned into a civil contract, giving authority to the state for the first time instead of the Church; this move paved the way for

permitting divorce (which was contrary to the Catholic religion) (see also *supra*, ch 1, para 2). Secondly, they were seeking unification of the country in terms of its law. The division into two different areas saw the application of the Roman *ius commune* (*pays de droit écrit, or de droit savant*) in the southern regions of France, starting with the reign of Philipp the Fair, or *Philippe le Bel* (1268-1314), and the Frankish-Burgundian customs alone (*coutumes*) in force in central and northern parts of the country (*pays de droit coutumier*).<sup>[31]</sup>

Roman law was not acknowledged as issued though the Justinian compilation (also because the Holy Roman Empire was keen to vindicate it as a source of its own law) but as customary law. The study of Roman law flourished at the universities of Montpellier (established in 1289) and of Toulouse (established in 1229 and becoming in 1233 the first *Studium generale*). The Montpellier school of law was founded by Placentinus (1130-1192), who belonged to the Bologna school of law. He went to Montpellier in 1160 and taught there during two different periods.

In 1454, Charles VII ordered that customs be collected and committed to paper, an undertaking that required much time and effort and was not completed before the end of the eighteenth century. The *droit coutumier* was thus collected and

published through royal *ordonnances*, [32] which however did not change their customary nature. To some extent they were deemed even to limit the king's legislative power, resting on an immemorial and uninterrupted tradition. [33]

The overlapping of *coutumes générales* and *coutumes locales* often engendered conflicts and uncertainties as far as their scope of application was concerned. After its publication in 1570, a greater authority was gradually acceded to the *Coutume de Paris*, applied by the Paris parliament. In case of further doubts or gaps, reference was made to Roman law as a corpus of legal wisdom (*ratio scripta*), accessible to better understand the rationale of customary rules or even used as a last resort to fill in the gaps of the *coutumes*.

The greatest commentator on the *coutumes* was **Charles Dumoulin**, or *Molinaeus* (1500-1566) (see also *supra*, ch 3, para 4), who published a renowned *Revision de la Coutume de Paris* (first edition of 1539). The commentaries by **Yves Coquille** (1523-1603) were also influential.

In order to overcome all the intricacies and uncertainties arising from medieval law, the advent of the French Revolution pleaded for the adoption of a codification of private law, which had already been advocated by natural lawyers

and, later on, was strongly supported by eighteenth century legal Enlightenment.<sup>[34]</sup>

Starting from 1793, many attempts were made to draft a code, to lay down the revolutionary law (*droit intermédiaire*), but all of them failed. It was Napoleon who achieved this goal after taking up full powers. He issued five codifications, the most important being that of civil law.

The *Code civil des Français* entered into force on 21 March 1804 and in 1806 was also officially styled as *Code Napoléon*.

In his St. Helen's Memoirs, Napoleon (allegedly) wrote: 'My true glory is not having won forty battles; Waterloo will blot out the memory of those victories. But nothing can blot out my Civil Code. That will live eternally'.<sup>[35]</sup>

Although preceded by other civil codifications in Europe, particularly in German territories (see *supra*, ch 2, para 5), the *Code civil* stands as the prototype of all civil codifications.

The *Code* was drafted by a commission composed of only four members, who, in only four months, were able to draw up the overall structure of the *Code*. Napoleon himself, although being a layman, is attributed a meaningful role in the drafting of (parts of) the *Code*.

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Jean-Étienne-Marie Portalis (1746-1806) was the most prominent member of the commission. He

authored a famous *Discours préliminaire au projet de code civil*, where the core principles of the Civil Code are exposed.

The French code represented a fortuitous blend of the pre-existing *droit écrit* and *droit coutumier*. [36]

As to succession and family law, the *code* largely rested on customary law, whereas the law of contracts and of wills, as well as the system of dowries as a contractual law regime, was based on Roman law. [37]

For customary law, the drafters of the *Code* mainly drew on the writings of François Bourjon (16?-1751).

For the law of contracts and obligations, they largely resorted to Roman law, as rationalized and exposed by Robert Joseph Pothier (1699-1772) and, to a minor extent, by Jean Domat (1625-1696), who had read Roman law through the lens of seventeenth century natural law.

The basic ideas of the *Code* were to: (i) make the law accessible to all citizens; (ii) break the particularism which had characterized the feudal regimes; (iii) uphold the principle of equal treatment; and (iv) apply the law irrespective of the social class or group to which a citizen happened to belong.

Despite its historical roots, the *Code* was less revolutionary than expected and was characterized by a fair equilibrium between legal

tradition and an alignment with the new values of freedom of contract and protection of private ownership.<sup>[38]</sup>

As well as being one of the paramount characteristics of the national esprit, the French Civil Code is renowned for its clarity and rationality, as well as for the elegance of its language.<sup>[39]</sup>

In his correspondence with Honoré de Balzac, the famous French novelist Stendhal (whose real name was Henri Beyle) in 1840 stated that ‘in writing the *Chartreuse*, to acquire the tone, every morning I read two or three pages of the Civil Code, so it would be natural’.<sup>[40]</sup>

After the enactment of the *Code*, French legal culture was imbued with positivism and nationalism. These aspects were clearly reflected in the strictly exegetical method that jurists adopted to interpret the norms of the *Code civil* (*école de l’exeégèse*).<sup>[41]</sup>

The name *école de l’exeégèse* was coined by Julien Bonnecase (1878-1950).

A famous sentence (perhaps falsely) ascribed to the Jean-Joseph Bugnet (1794-1866) gives a telling account of the exegetical attitude of French scholarship in the face of the newly enacted civil code: ‘I am not aware of private law: I only teach the *Code Napoleon*’ (*‘Je ne connais pas le droit*

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*civil: je n'enseigne que le Code Napoléon').*

However, Jean-Étienne-Marie Portalis (see *supra*, in this para), during the discussion of the *Titre préliminaire* of the *Code civil* in the session of the Conseil d'État of 14 *thermidor* an IX, said: ‘Few cases are likely to be decided by a precise text; it is according to the general principles, to the doctrine, to the science of law, that we have always pronounced on most disputes. The *Code civil* does not disregard all this knowledge; on the contrary, it implies it’. [42]

It was only around the beginning of the twentieth century that jurists attempted to promote a radical renovation of French legal culture, done by loosening the grip of exegetical positivism in which it had been tightly bound. This objective was pursued through renewed methods based on sociology and legal comparison, as well as through greater attention to the creative role of jurisprudence.

François Gény (1861-1959) advocated the legitimacy of a more ‘*libre recherche scientifique*’, to which resort was to be had when the positive law was defective. [43] He was also a notable supporter of natural law.

An important contribution to the renewal of French legal culture was made by Raymond Saleilles (1855-

1912) (see *supra*, ch 3, para 3.1), who actively promoted the diffusion and enhancement of comparative law in France, together with jurists such as René Demogue (1872-1938) and Édouard Lambert (1866-1947) (see *supra*, ch 3, para 3.1).

Marcel Planiol (1853-1931) was the author of a famous *Traité élémentaire de droit civil*, whose first edition was published between 1899 and 1901. In that work, he referred above all to the *droit vivant* (law in action), searching for it through an analysis of jurisprudence and through legal comparison. The subsequent editions of the *Traité* were co-edited by Georges Ripert (see *infra*, ch 7, para 1).

The occasion of the Code's bicentenary, in 2004, also marked the completion of a vast program of reforms of its main sections. It culminated in the reform of the law of contract and of the general law of obligations of 2016;<sup>[44]</sup> which entered into

<sup>120</sup> force on 1 October 2016 and was (slightly) amended in 2018.<sup>[45]</sup> The amendments served mostly to crystallize a number of the 'great judgments' (*grands arrêts*) passed by the *Cour de Cassation* to supplement the provisions of the *Code civil*, which were grossly incomplete on a number of subjects (like formation of contract).

Furthermore, some provisions drawing on the new trends of European contract law were thus introduced into the *Code civil*.<sup>[46]</sup> Currently, a

reform of the law of civil liability is underway: in March 2017, an *Avant-projet* was published by the French Ministry of Justice.<sup>[47]</sup>

### 3.1.2. The German *Bürgerliches Gesetzbuch* (BGB)

The enactment of the French *Code civil* stirred a vast debate in Germany as whether to seize the opportunity to accomplish a similar achievement.

In 1814 a famous controversy saw two great jurists of the time taking opposing sides. Anton Friedrich Justus Thibaut (1772-1840), professor at the university of Heidelberg, advocated for immediately drafting a German Code. Friedrich Carl von Savigny (1779-1861) on the other hand, although not against the idea in principle, argued to first develop a stable corpus of doctrines and concepts and only afterwards to set them out in a comprehensive codification.

Thibaut's side was taken by a man who had historically served as the great cultural enemy and rival of von Savigny in the same Berlin University, namely the great philosopher Georg Wilhelm Friedrich Hegel (1770-1831). In his *Elements of the Philosophy of Right* (1829), which significantly carry the subtitle *Or Natural Law and Political Science in Outline*, Hegel wrote that denying a civilized nation, or the legal profession within it, the ability to draw up a legal code would be

among the greatest insults one could offer to either.<sup>[48]</sup> It was a clear attack against von Savigny's contention.

The German Confederation (*Deutscher Bund*) built up after the Restoration (1815) provided for a certain degree of codification of commercial law, both through the legislature and the judiciary (see *infra, ch 7, para 2*). The re-establishment of the German Empire (*Deutsches Reich*) in 1871, which marked the attainment of German national unity, laid down the basis of a unified civil law, although it was only some years later that it was entrusted with full legislative competence for all matters of private law.<sup>[49]</sup>

From this foundation, in 1874 a commission was charged with the task of drawing up a German Civil Code. The most prominent members of it were Gottlieb Planck (1824-1910) and Bernhard Windscheid (1817-1892), who is usually credited as having exercised a major influence on the commission's work.

The first project (*Erster Entwurf*) did not meet with much success, as it was deemed too technical, complex, and abstract, and led to calls for a 'popular law'.<sup>[50]</sup>

The critique was led by Otto von Gierke (1841-1921), who famously demanded that (at least) 'a drop of socialist oil' be added to the draft.  
<sup>[51]</sup>

It was thus necessary to appoint another commission, which drafted a second project (*Zweiter Entwurf*), published in 1895 with the preparatory works (*Protokolle*).

The German Parliament (*Reichstag*) enacted the code in 1896, with the only vote against made by the Social Democrats.<sup>[52]</sup> The code entered into force on 1 January 1900.

In contrast to the French code, the German BGB paid no heed to local customs, nor to any German law, but rested completely on Roman law. In this respect, the influence of the Historical School (*Historische Rechtsschule*), led by von Savigny, proved decisive (see *infra, ch 9, para 1*),<sup>[53]</sup> in that it assumed that the ‘popular mentality’ (*Volksgeist*) of the German people was enshrined in the Justinian compilation, ie (allegedly) classical Roman law. It thus carved out the concept of a contemporary Roman law (*heutiges Römisches Recht*), also fathered by Gustav (Conrad von) Hugo (see *supra, ch 2, para 2*).

The history and evolution of Roman law were characterized by its tendency towards a growing conceptualism and formalism, which reached its peak with the German ‘Pandectistic school’ (*Pandektenlehre*) of the late nineteenth century. It elaborated the theoretical and methodological basis of juridical studies that are still prevalent in civil law systems and that can be described as ‘dogmatic’.

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The starting point of this scientific program was provided by the great cultural enterprise of **Friedrich Carl von Savigny** (1779-1861), who worked on the creation of a system of contemporary Roman law (*System des heutigen römischen Rechts*). He was the founder of the **Historical School of Jurisprudence**, a movement characterized by two methodological aspects of equal importance – namely, the historical and the systematic approach to the knowledge of law.

Focusing only on the second of these two aspects, von Savigny's epigones disregarded any historicist consideration concerning the available sources of Roman law and instead proved to be exclusively concerned with the goal of erecting an organic and coherent conceptual system. In this effort, they mainly sought to present the law and its study as a proper science (*scientia iuris*), [54] comparable to those sciences of nature that had in the meantime conquered the limelight of Western thought.

The most significant member of this thread is generally considered to be Georg Friedrich Puchta (1798-1846), who was a disciple of von Savigny and, at the same time, a follower of one of his fiercest adversaries, Hegel (see *supra* in this para). Puchta analyzed legal concepts as a closed system, where mere formalistic and logical deductions enabling one to 'calculate' the legal response were triggered by any case.

Largely used and influential were also the Pandectistic works by Karl Adolph von Vangerow (1808-1870), Heinrich Dernburg (1829-1907), Ernst Immanuel Bekker (1827-1916), and above all Bernhard Windscheid (1817-1892) (see *supra* in this para).

The organicist conception of the law advocated by the Historical School of Jurisprudence suggested a systematic classification of the contents of Roman law through their conceptual formalization in juridical institutions. If the system that the Pandectists strove to achieve can be compared to a human body, the various juridical institutions can be compared to the single organs that, within that body, coherently contribute to keeping it alive and allowing it to properly perform its functions.

Each juridical institution represents the synthesis of all the legal contents necessary to carry out a specific regulatory function, and each institution is characterized by a relationship of complementarity and interaction with the other institutions, since each of them is equally indispensable for the overall functioning of the system. The peculiarity of the Pandectistic school is that of having conceived juridical institutions as ideal realities, thus enabling a jurist to deductively infer – from abstract concepts – solutions and rules for unregulated cases. In this sense, borrowing a word from theology, legal scholarship still speaks of ‘dogmas’ and ‘legal dogmatics’.

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The structure of the BGB was laid out along the so-called *Pandektensystem*, [55] which is based upon the division of subject matters into obligations, property, family law, and succession. [56] The truly distinctive feature of the BGB, however, must be acknowledged in its **General Part** (*Allgemeiner Teil*), [57] which is the first book of the code, and sets forth all definitions and general rules to be detailed and supplemented in the subsequent provisions. [58]

The foundation of the ‘Pandektensystem’ is attributed to Georg Arnold Heise (1778-1851), who laid it out in his *Grundriß eines Systems des gemeinen Civilrechts zum Behuf von Pandekten-Vorlesungen* (1807).

A recognized characteristic of the BGB lies in its development of a **huge system of abstract concepts**, that does not mirror legal practice, but rather reflects the conceptual structure built up by scholars and professors of law. In fact, German scholarship developed on the BGB is famous worldwide for its technical sophistication and systematic rigor in forging and using conceptual categories.

The growing influence of dogmatism during the nineteenth century provoked a strong reaction among several exponents of the Pandectistic scholarship, guided by one of its greatest figures, Rudolf von Jhering (1818-1892).

In a satiric booklet first published in 1884, von Jhering played the role of ‘the lame devil, who raised the roofs of the town and showed the secrets of the households to his *protégé*’: [59] the households which he thus exposed to the curiosity of the reader were the studios where the scholars of civil law, including von Jhering himself, used to spend their nights at the light of a tiny lamp illuminating the sources of Roman law, thus tirelessly erecting the system of private law (*‘die civilistische Konstruktion’*). [60] In order to depict this line of legal thought, which entailed the entire scholarship of the preceding fifty years, von Jhering forged the neologism of ‘conceptual jurisprudence’ (*Begriffsjurisprudenz*). [61]

[61] After his work, in the subsequent literature dedicated to the methodology of civil law, this term carried a decidedly negative connotation. [62]

Ironically, von Jhering claimed to be unaware of just who had originated this strand: ‘As for what is known to me, this construction itself was reconstructed and given its own direction, and it was even undertaken to create a higher level of jurisprudence, which was then given the name of “higher jurisprudence”’. [63]

The polemic by von Jhering paved the way for

new tendencies in legal studies. This paradigmatic turn was expected to have a direct impact on the methodology of filling legal gaps, which posed the question of how legal responses to tangible cases were to be construed.

A decisive step forward was taken by Philipp Heck (1858-1943), who intended to forge a ‘teleological jurisprudence’ (*Interessenjurisprudenz*), based on the assessment of the interests involved in the case and confronting the ‘formalistic jurisprudence’ (*Begriffsjurisprudenz*) that von Jhering had already derided.<sup>[64]</sup> This methodology was adopted by the members of the ‘Tübinger school’.

Adopting an even more radical approach, Eugen Ehrlich (1865-1922) proposed to rid judges of the bond of fidelity to written legislative texts and to allow them to proceed with a free search for law (*freie Rechtsfindung*), thereby advocating a strong contribution of sociological studies in the legal discourse.

During the twentieth century, large parts of the BGB were completely revised; for example, the family law enshrined in its fourth book was completely re-written. The most important and far-reaching of these reforms, however, is known as ‘modernization of the law of obligations’ (*Schuldrechtsmodernisierung*) of 2001.<sup>[65]</sup> Entering

into force on 1 January 2002, it not only cured some of the shortcomings of the old provisions of the BGB on obligations, but went as far as incorporating European private law (see *infra*, ch 8, para 1.5.2) that had been previously implemented in special statutes.

### 3.1.3. The Italian *Codice civile* of 1942

After achieving national unity in 1861 thanks to the political activities of the Piedmontese prime minister, count Camillo Benso di Cavour, the cultural activism of Giuseppe Mazzini, and the military action of Giuseppe Garibaldi, a wide process of administrative and legal unification of the newly founded Kingdom of Italy was initiated. It was not a difficult task as far as private law was concerned, in light of the substantial homogeneity of the below-mentioned pre-unification codes.

After the Restoration sanctioned by the Congress of Vienna (1814-1815), the Italian territory had found itself once again divided into several small states, where the *Code Napoléon* was abrogated (only partially in the Principality of Lucca). [66]

Four such states, namely the Kingdom of Sardinia (which also included Piedmont, Savoy, Sardinia, Nice, and Genoa), the Duchy of Parma and Piacenza, the Duchy of Modena and Reggio Emilia, and the Kingdom of the Two Sicilies,

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enacted their own civil codes, which took the French Civil Code as a model, although amending and often improving it.

In the Kingdom of Lombardy-Venetia, under Austrian domination, the *Allgemeines Bürgerliches Gesetzbuch* (ABGB) of 1811 was introduced on 1 January 1816. By contrast, the State of the Church was left without a proper civil code.

In 1865, the first Italian Civil Code (*Codice civile*) was then enacted, which entered into force on 1 January 1866. It was mostly based on an Italian translation of the French *Code civil*.

In 1923, Vittorio Scialoja (1856-1933) was entrusted by the government to chair a commission for the reform of the Civil Code. The task was then continued and to a large extent completed by Filippo Vassalli (1885-1955), to whom is owed the general linguistic and conceptual review of the norms which were being drafted.

Between 1938 and 1942, the six books of which the code is made of were progressively enacted, and the code came into force in its entirety on 21 April 1942. After the fall of the Fascist regime and the dismantling of the corporatist system (1943-1944), however, it was debated whether the Civil Code would have to be comprehensively abrogated.

One of the most prominent authors who expressed himself in this

direction was Lorenzo Mossa (1886-1957), Professor of Commercial Law at the University of Pisa, who came to define the Civil Code as ‘codice dei fascisti’ (a Fascist code). [67]

The outcome of this discussion was an answer in the negative, taking into account that, despite some lexical or superficial elements, the code was the expression of the **liberal culture** of its **drafters**, not of the authoritarian or nationalistic culture of the political regime which had requested it. [68]

From the point of view of its contents, the Italian Civil Code can be considered a sort of compromise between the German and the French model, combining the advantages of the two.

It is also known for having eliminated the distinction between commercial and civil law (**unification of private law**) (see *infra*, ch 7, para 2).

## 4. Common law jurisdictions

The tenets of the French Revolution could not gain ground in England, which therefore never implemented the doctrine of separation of powers.

The historical reason for failing to take on Enlightenment doctrines in England may be that the democratization of politics had already been achieved there through the long civil war which led Oliver Cromwell to power (1642-1651), and the so-called Glorious (or Bloodless) Revolution (1688-1689).

As a result, common law jurisdictions have been traditionally based upon cases decided by the courts (**precedents**), whereas legislative measures (**statutes**) passed by the Parliament played a minor role until recent times. Intuitively, therefore, both common law and the Constitution of the United Kingdom are not codified.

The homeland of common law is **England**, [69] which, since the time of King Henry VIII, has constituted a single legal system with that of **Wales**. [70] In the context of the United Kingdom, the common law is also applied in **Northern Ireland**. [71]

Although dependencies of the British crown, the Channel Islands (ie the Bailiwick of Jersey and that of

Guernsey) are still ruled by Normand customary law (see *infra*, ch 4, para 5).<sup>[72]</sup>

Despite forming the UK with England in 1707, Scotland has a jurisdiction substantially anchored to the continental *ius civile*,<sup>[73]</sup> also due to its Catholic heritage.<sup>[74]</sup>

<sup>127</sup> The civil connotation of Scottish law is partly due to the work of Sir James Dalrymple (1619-1695), first Viscount of Stair.<sup>[75]</sup>

Scottish law is nonetheless considered a mixed jurisdiction (see *infra*, ch 4, para 5), built on the *ius civile* but with a strong and evident influence of English common law.

Similar considerations can be made for Louisiana with respect to the US and for the province of Quebec with respect to Canada. Both jurisdictions are former French colonies that have maintained a codified legal system based on the Civil Law.

In Louisiana, the Civil Code has been in force since 1825, and it has been amended several times over the years.

The Civil Code of Quebec (or *Code civil du Québec*) entered into force on 1 January 1994. It replaced the Civil Code of Lower Canada (*Code civil du Bas-Canada*), which had been enacted in 1865.

In general, both the US and Canada are common law jurisdictions,<sup>[76]</sup> as are Australia,<sup>[77]</sup> New Zealand, and the other former British colonies or countries formerly mandated by England (including some Asian, Caribbean, and African territories).

Thus, despite showing a certain number of unique aspects,<sup>[78]</sup> the legal systems of all these countries share an extensive bulk of commonalities. What we refer to as common law is the merger or at least a juxtaposition of two different components, namely common law *stricto sensu* and equity (see *supra*, ch 2, para 4.2). Their distinction was historically due to and reflected in two judicial hierarchies, each of them being autonomous from the other.

Over time, such dualism proved increasingly untenable from the point of view of the judiciary and the rules of civil procedure. Indeed, the co-existence of two judicial hierarchies, sometimes running parallel and other times overlapping, caused more and more considerable complications for the functioning of common law legal systems.<sup>[79]</sup>

In the US, towards the mid-1800s the legislature began increasingly to enact law reform that had been previously promoted by equity courts; the latter thus became a useless complication.

Eventually, the New York Constitution of 1846 abolished the court of chancery, flanked by the

New York Code of Civil Procedure of 1848 (see

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*infra*, ch 7, para 3.2), which merged law and equity.

[80] Subsequently, most of the other American states did the same.

The US model was later followed by the UK, where the dualism between the two jurisdictions was overcome through the Judicatures Acts of 1873-1875, although it is still disputed whether this only occurred from a procedural point of view, or whether a true merger of substantial law occurred. [81]

Common law jurisdictions, notably the English, are traditionally characterized by the precedence of judge-made law over statutes, although this point looks like becoming less paramount over time (see *infra*, ch 7, para 3.2). Judge-made law is typically expressed through the rule of *stare decisis*, which is not recognized in civil law jurisdictions (see *infra*, ch 7, para 3.2).

In modern times, the first systematic exposition of the common law is to be found in the *Commentaries on the Laws of England* by William Blackstone (see *supra*, ch 2, para 5), whereby he affirmed the ‘superior reasonableness’ of common law over civil law. [82] Such statement contributes to explaining the fortune his works had in the Anglo-American world. [83]

## 5. Mixed jurisdictions

Mixed jurisdictions are first found in those local contexts where, for historical and political reasons, a splinter of civil law coexists within a wider state context which is dominated by common law.<sup>[84]</sup>

This is the case of Scotland, in Europe (see *supra*, ch 4, para 5); and of Louisiana and Quebec in the US and Canada, respectively (see *supra*, ch 4, para 5).

The Channel Islands (see *supra*, ch 4, para 5) are a different case but are nonetheless included in the mixed jurisdictions.<sup>[85]</sup>

A somehow similar phenomenon is to be found in those countries that were, albeit temporarily, under the administration of the UK, like Cyprus.

<sup>[86]</sup>

This is the case of Malta, where the backbone of the legal system is a codified system under Italian influence,<sup>[87]</sup> to which a strong common law component was added by the English starting from the nineteenth century.

This is also the case, albeit with some differences, for Israel, which has built a legal system of its own starting in 1948.<sup>[88]</sup> This system, although mainly developed on civil law principles, has also been strongly influenced by the legislation

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enacted during the British mandate for the administration of Palestine.

The founder of Israeli law was the Italian Guido (Gad) Tedeschi (1907-1992), who contributed to the birth of the law faculty of the Hebrew University of Jerusalem. He inspired and partially drafted a series of general laws (on contract, unjust enrichment, etc.), which have in fact carried out a progressive codification of Israeli law. A project of civil code has been under consideration before the Knesset for a number of years, which was mainly drafted by one of Tedeschi's disciples, namely Aharon Barak, who served for many years as the President of the Israeli Supreme Court.<sup>[89]</sup>

A peculiar case is South Africa and the other countries where Dutch-Roman law is applied (see

<sup>130</sup> *supra, ch 4, para 3).*

## Glossary

## Biographies

## CHAPTER 5

### Law and justice

- Natural law and positive law (or legal positivism)
- The dilemma of unjust law
- The renaissance of natural law after World War II

The justification of law is traditionally swinging between two extreme views. According to the doctrines of natural law, the law must be abided by because it rests on the precepts of justice (*ius quia iustum*). According to positive law doctrine (or legal positivism), the law must be abided by because it is imposed by a legitimate authority and backed up with sanctions (*ius quia iussum*). A classical bone of contention between the two views is the issue of ‘unjust law’, whether or not it is still law and how citizens and officials should deal with it.

Natural law doctrine flourished in antiquity and was later on based on the Christian concept of natural order (*ordo naturalis*), particularly as formulated by St. Thomas Aquinas. The ‘strong’ version of this doctrine claims that ‘unjust law is no law at all’, whereas the ‘weak’ version contents itself with pointing out that unjust law is defective and should be amended by the legislature.

The way to legal positivism was paved by the experimental method of natural sciences, as well as by the tenets of Darwinism. Legal positivism claims that the law ‘as it is’ does not necessarily meet the requirements of ethics, or of justice (the law ‘as it ought to be’), thus engendering a ‘pure theory of law’.

Hart’s theory of a ‘minimum content of

natural law' strikes a balance between the two extremes of the pendulum and may be described as a 'mild' or 'weak' version of legal positivism. On the one side, this view underwent a close scrutiny by Ronald Dworkin, who accused it of being incapable of accounting for the adjudication of 'hard cases', where no black-letter rule is provided for and, therefore, principles based on the shared practices of a certain community of lawyers are paramount. On the other side, and in reply to Dworkin, Hart's theory was challenged by Joseph Raz, who advocated for a 'strong' version of legal positivism, exalting the absolute sovereignty of the state.

After World War II, a revival of natural law doctrine took place, which culminated in the 'Radbruch formula'. It holds that, where the law is unbearable for mankind in any sense, it must not be applied. This doctrine constituted the legal basis for the Nuremberg trials against the criminals of the German National Socialist Party, who committed crimes against mankind (particularly with regard to the deportation and extermination of European Jews).

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## 143 1. Two (incompatible?) views of law

At the very outset of his masterpiece, *The Concept of Law*, **Herbert L.A. Hart** (1907-1992) openly stated that: 'Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question "What is law?"'. [1]

Innumerable as they may be, however, the answers given during the course of history to the crucial question about the concept of law may be gathered into two main groups.<sup>[2]</sup> The first group is based on the ancient sense of law embodied in the concept of **natural law**,<sup>[3]</sup> the second, on the modern ideas of **positive law** (or **legal positivism**).<sup>[4]</sup>

In a nutshell, the issue of the distinction between natural law and positive law was raised by Socrate's question to Euthyphro in Plato's dialogue: 'Is the pious (*τὸ ὄστιον*) loved by the gods because it is pious, or it is pious because it is loved?' (Euthyphro dilemma).<sup>[5]</sup> To explain the meaning of his question differently, one might ask whether the law as such must be abided by because it is just *per se* (*ius quia iustum*), or because it has been imposed or enforced by some authority entitled to do so (*ius quia iussum*) (see *infra, ch 5, para 4*). In the first case, reference is made to natural law, in the second, to positive law (or legal positivism).

These two stances are opposed to each other and constitute a major alternative. However, a wide spectrum of intermediate positions, which are subtly nuanced and differentiated, extends

<sup>145</sup> between the two extremes of the pendulum.

Actually, both 'natural law' and 'positive law' may be, and as a matter of fact have been, understood in many different ways, to the point that some of the numerous versions of legal positivism may be

regarded as supporting or, to some extent,  
including a form of legal naturalism as well.

## 2. Natural law and human reason

The classic doctrine of natural law was fathered by St. Thomas Aquinas (1225-1274), [6] who revisited the Aristotelian ethic consistently with Christian precepts. In his *Summa Theologiae*, St. Thomas addressed a series of ‘disputes’ (*quaestiones*) regarding law, [7] which he defined as ‘nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated’. [8]

That way, law was perceived and understood as the mirror of the **natural order** (*ordo naturalis*) containing all beings and things. This order was deemed to be based on reason and mirrored not only in human law but also in divine law (although the latter was largely considered not to be accessible by mankind). Nevertheless, according to this theory, the law had to be promulgated, not only because of the fact that the vague requirements of natural law demanded it be laid down at times, but also because this was necessary in order to justify compliance with the law. In fact, as men are ‘rational beings’, they are amenable to abiding by and applying the law solely if they have previously been aware of and understood it. [9]

During the seventeenth century, natural law was secularized and reinterpreted not only in the light of the tenets of Cartesianism but also of the

epistemological model of natural science. Consequently, the ‘geometric model’ (*ordo geometricus*), which Baruch Spinoza (1632-1677) had already applied to ethics,<sup>[10]</sup> was followed with regard to law.

Moving from the Second Scholastic, or School of Salamanca,<sup>[11]</sup> which had provided a fundamental advancement in both theological and legal thinking, natural law authors contributed to the progressive establishment of the rights to freedom for all men that led to the great religious, political, and philosophical developments of the modern age.

<sup>146</sup> In the doctrine of natural law, ‘unfair law is no law at all’ (*lex iniusta non est lex*) and therefore it cannot be legally enforced. In this sense, justice is interpreted as the paradigm by which the law should be defined and therefore, where this criterion is not met, no law can be deemed to exist.

This version of natural law can be defined as ‘strong’, making justice or injustice a defining criterion of what the law is. In other words, where such criterion is not satisfied, no law is acknowledged. Robert Alexy compares this ‘strong’ definition of natural law to a ‘weak’ definition, under which justice is only a criterion of qualification, meaning that even when such criterion is not satisfied, one can still talk about law, as long as it is held to be defective and, therefore, with a negative connotation.<sup>[12]</sup>

In the twentieth century, a ‘weak’ theory of natural law was strongly advocated by **John Finnis**, who states that unreasonable laws are laws only in a secondary, derivative, and incomplete sense. [13]

As an incorrect map is still a map, unjust law is still law. Though, as an incorrect map is not able to guide someone to the desired spot, so unjust law is unfit to serve its own purposes.

### 3. Positive law and political might

Between the sixteenth and the seventeenth century, the ancient sense of nature was increasingly questioned by science and eventually dismissed. The **rise of a new rationalism**, which had been completely unknown in antiquity, inaugurated modern thinking.

Paramount to this paradigmatic change was the adoption of the **experimental method by the natural sciences**. The view of a teleological, natural order of everything (*kosmos*), including men, was swept away and replaced by the understanding of nature as dominated by chance and coincidence (*chaos*).

Instead of following an intelligent design, where each being and thing was put in its proper (ie fair) place, the natural environment was now unveiled by science as an empty space, where matter was being transformed by random clashes of atoms and life evolved by natural selection (**Darwinism**). Therefore, deprived of any inner rationality, nature could not establish any requirement of justice, which were therefore totally abandoned to the hands of men, to their forces and decisions.

Under this understanding, law does not exist as such, but only as it is enacted through the legislature and the judicature, which deliberately create it. Law is what the legislature and the

judicature stipulate it shall be. According to the harsh dictum by Thomas Hobbes (see *supra*, ch 1, para 1), ‘*auctoritas, non veritas, facit legem*’ (‘it is the power, not the truth, that dictates the law’). In one single word, law, thus, becomes ‘positive’ (see also *supra*, ch 3, para 1). The advent of the Westphalian paradigm created the institutional cadre that was needed by this new understanding of law (see *supra*, ch 3, para 2), which inevitably implied statism and, to some extent, nationalism.<sup>147</sup>

In 1854, Bernhard Windscheid (see *supra*, ch 4, para 3.1.2) notably affirmed that ‘the dream of natural law had faded’,<sup>[14]</sup> although he himself, after a few decades, then confessed that he still believed it to be possible.

It is undeniable that, during the nineteenth century, legal positivism has gradually overcome legal naturalism, thus becoming the mainstream discourse about law and embodying the current mentality of jurists.

In the history of ideas, critics of natural law would argue that one cannot derive from what is (ie nature) what ought to be (ie law); this has come to be known in the history of Western thought as the ‘naturalistic fallacy’, which was then differently articulated in the continental European tradition and in the Anglo-American tradition.

In the continental European tradition, it was

Immanuel Kant (1724-1804) who clearly introduced the distinction between what the law is and what the law ought to be. In particular, in his *The Metaphysics of Morals* (1797), Kant emphasized that jurists can only deal with positive law, ie **the law as it is** (*quod sit iuris*), and that their books and theories are of value only to the extent that they correspond to the laws in force. Since legal science is bound by positive law, as such it would be ‘like the wooden head in Phoedrus’s fable, a mere empirical doctrine of rights’, which ‘is a head that may be beautiful but unfortunately it has no brain’. [15]

Moving from this approach, which had already taken root, Julius von Kirchmann (1802-1884) highlighted the problem of the worthlessness of legal science. In distraught and borderline disgusted terms, he had to note that: ‘The jurists are “worms”, who live only from rotten wood; they stay apart from what is sound, nesting and weaving solely in what is sick. Insofar science draws on a contingent subject, it condemns itself to contingency; three amending words of the legislature and entire libraries become rubbish’.

[16]

According to Kant, it would be up to the philosophers to deal with natural law, ie **the law as it should be** (*quod sit ius*), thus developing a doctrine of rights grounded on practical reason, ie on justice.

The Kantian approach, which implies a rigid

separation between the law and philosophy (and therefore also from morality and ethics), clearly constituted a cultural foundation for the work of the scholar who can be considered the true father of European legal positivism, namely **Hans Kelsen** (1881-1973). As expounded in his masterpiece, ‘*Pure Theory of Law*’ (*Reine Rechtslehre*), the first edition of which was published in 1933, Kelsen’s theory is premised upon the basic assumption that the law resides in legal rules, or norms, which are completely autonomous from religion, morality, and so on. In this sense, this theory is qualified as ‘pure’.

If in the continental European tradition juridical positivism is strongly characterized by rationalism and by the formalism of Kantian philosophy, in the Anglo-American tradition it is instead based on the articulation of the ‘is-ought problem’ posed by David Hume (1711-1776).

‘In every system of morality, which I have hitherto met with, I have always remark’d, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible;

but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason'. [17]

The Anglo-American approach to legal positivism has been characterized from the outset by its empirical and utilitarian terms. Positive law is that which is likely to be experienced in fact and natural law is determined by the pursuit of happiness and the well-being of society. [18]

In particular, it was the radical criticism of the position of William Blackstone (see *supra*, ch 2, para 5) which paved the way for the English road to juridical positivism; Blackstone in his *Commentaries* had stated that human laws were invalid if they were contrary to the law of God, since the latter is superior in their obligation to any other law.

The critique of Blackstone's statement is clearly found in the works of Jeremy Bentham (1748-1832), who thus challenged tremendously the legitimacy of the anarchist's claim not to abide by any law which does not conform to their radical principles.<sup>[19]</sup> By contrast, the foundations of the *Rechtsstaat*, which are passionately defended by Bentham, allow individuals 'to censure freely' the law, but at the same time oblige them 'to obey [it] punctually'.<sup>[20]</sup>

Moving from the same assumption, John Austin (1790-1859) could clearly affirm that: 'a law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation' (**imperativism**).<sup>[21]</sup>

During the twentieth century, the merit of returning to the doctrine of legal positivism is certainly attributable to Herbert L.A. Hart (1907-1992). Hart purged the residues of subjectivism that characterized the version as rendered by Austin and reformulated it in terms that are still widely accepted in English legal culture (see *infra*, ch 6, para 1.1). The version of legal positivism given by Hart, which was enshrined in his masterpiece *The Concept of Law*, certainly owes its origins to that of Kelsen, but is also characterized by the incorporation of some elements compatible with natural law.

In particular, Hart asserts the existence of a 'minimum content of natural law', noting that,

without such content, laws ‘could not forward the minimum purpose of survival which men have in associating with each other’. [22] Reference is made, by way of example, to the rules providing for the restriction ‘of violence in killing or inflicting bodily harm’. [23] Furthermore, Hart asserts that moral practices can help to identify the rule of recognition that constitutes the foundation of any legal system (see *infra*, ch 6, para 2.1). [24]

For this reason, the version of legal positivism that has been proposed by Hart can be qualified as ‘mild’, or ‘inclusive’. The delicate balance characterizing it carries the risk that one of its elements might be frustrated to the extent that the whole becomes subject to a unilateral fracture, in one direction or in another. This risk was fatally exposed by the works of two of Hart’s most significant disciples.

On the one hand, a strong version of legal positivism, which exalts the authority of the state and rejects any form of ‘compromise’ between law and morality, was put forward by Joseph Raz.

On the other hand, Ronald Dworkin (1931-2013) has subjected Hart’s teachings to close scrutiny from a point of view similar to that of natural law.

Hart responded to Dworkin’s criticism in a long postscript to the second edition of his *The Concept of Law*. This postscript was published posthumously in 1994. [25]

In particular, Dworkin emphasized the importance of the law being examined and represented in relation to the internal viewpoint of the members of the groups who accept and use its rules, a point which had already been clearly made by Hart.<sup>[26]</sup> Dworkin thus contrasted it with the claim of legal positivism that a proper account of law might be given through a merely descriptive and not evaluative theory (like the one developed by Hart). Instead, he advocated for an ‘interpretive’ and partly evaluative theory of law, which can be actively involved in putting the law in its best light and in promoting the best possible legal response to ‘hard cases’, ie cases which are not yet covered by settled law and, therefore, raise contention between different theoretical camps (see *infra*, ch 6, para 3; ch 7, para 3.2).

In order to carry out this task, jurisprudence should start not (so much) from rules, but from principles (see *infra*, ch 6, para 3), representing requirements of justice or fairness, which stand as the best framework and justification for legal practices and paradigms of law, commanding lawyers’ general consensus in a given legal system. According to Dworkin’s view, principles are the best depiction of a ‘preinterpretive’ basis, which is constituted by settled legal practices or paradigms of law that are shared by a given community.<sup>[27]</sup>

For example, Dworkin took into

consideration the case of abortion, which inevitably raises political and juridical conflicts. Any legal decision about abortion only makes sense if it takes as starting point either the principle of the fetus' fundamental right to life (where this principle commands lawyers' consensus in that community of law) or that of the mother's privacy (where this second principle commands such consensus). For example, a statute allowing abortion for two thirds of the fetus (unworkable), or a statute allowing abortion only for mothers with blue eyes (inefficient) would not make any sense.

Legal positivism fails to account for principles because of (at least) two reasons.

First, principles are (the soundest) part of the law, but they might not be acknowledged by a 'basic rule', or 'rule of recognition' (see *infra*, ch 6, para 2.1), since they precede any such rule. They can only be identified and recognized if one starts from the assumption of the 'law as integrity'. [28]

Since the judge has to issue the 'right' decision, [29] especially when solving 'hard cases' that might lead to conflicting legal solutions, she is called to perform a demanding task, which Dworkin compared to those assigned to Hercules by Greek mythology, [30] namely that of distilling the principles and the history of the interpretive community to which she belongs into her

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decision, thus putting the law in its best light.<sup>[31]</sup>

Thus, a strongly holistic conception of the legal system is affirmed, which allows the interpreter to seek the solution to practical problems not in the individual rules considered in isolation but rather in the organic culture of the legal juridical phenomenon.

The decision for each individual case is ‘just’ only if, and insofar as, it is taken by the judge (or more generally by the interpreter) by bringing together the matrix of principles and history that constitute the organizational fabric of a society. In this sense, jurisprudence ceases not only to be non-judgmental but also to be general (in the sense of universal), since it constitutes instead the general part of each specific legal order, thus operating as a ‘silent prologue to any decision at law’. <sup>[32]</sup>

Second, unlike rules, principles are not characterized by an ‘all-or-nothing’ application, which is required in every instance of conflict. Any conflict of rules must be solved in favor of one of them, otherwise the consistency of the legal system is affected. Conflicts of principles however leave the principles themselves untouched because, although conflicting, each principle may play a (major or minor) role in finding the best possible answer by law to a relevant case.

In his passionate reply to Dworkin’s criticism, Hart claims that differences between ‘rules’ and

‘principles’ are just a matter of appreciation, holding that both may be understood as (narrower or broader) norms in the sense advocated by legal positivism. [33]

## 4. The dilemma of unjust law

A classic bone of contention between legal naturalism and legal positivism comes from the issue of ‘unjust law’ and the attitude that citizens and officials should have towards it.

It is a classical dilemma addressed in ancient Greek philosophy, above all in Sophocles’ tragedy about *Antigone*.

Creon, the new king of Thebes, ordered that, for political reasons, the corpse of Polyneices, Antigone’s brother, must not be buried. In the name of the laws of nature, however, Antigone dared to oppose the political power of the head of the city (*polis*) and accomplished what Creon had forbidden.

Due in part to the attention paid by Georg Wilhelm Friedrich Hegel (see *supra*, ch 4, para 3.1.2) in his *Phänomenologie des Geistes* (1807),<sup>[34]</sup>

<sup>152</sup> Antigone has become a symbol of natural law and of its possible opposition to the men’s laws.

One of the most famous Italian scholars of commercial law of the 1950s, namely Tullio Ascarelli (1903-1959), put Antigone on a par with Portia, the Shakespeare’s feminine protagonist from *The Merchant of Venice*, who stands as a symbol of the subtleties of legal argumentation based on positive

law.<sup>[35]</sup>

If one thinks the law is such insofar as it is fair (*ius quia iustum*), it can be concluded that unjust law is not law and therefore cannot (and should not) be respected and applied. The question then arises as to who can decide when the law is unjust, and based on which criteria, and what happens when a conflict arises between those who believe it to be unjust and those who disagree according to perhaps different religious or philosophical concepts.

If, on the other hand, one thinks that the law is such because it is imposed or ordered by some authority that has the power to do so (*ius quia iussum*), one comes to the conclusion that it can (and perhaps also should) be respected and applied however unfair its content may be. This raises the problem of coordinating the imposition of orders or commands that may have repugnant content from a humanitarian point of view.

It is evident that the doctrine of legal positivism can easily attract the criticism of condescending to unjust laws, since from its point of view it must be considered as formally in force irrespective of its actual content. However, it should be noted that this accusation is not founded, at least from a moral perspective.

In fact, precisely the distinction between ‘the law as it is’ and ‘the law as it should be’ has enabled the best expressions of legal positivism to subject

the positive law to criticism based on its irrationality or on its inability to ensure the well-being and happiness of men. In this sense, Hart has claimed that it is legal positivism itself that could be able to denounce unjust law and to promote its reform. One can, for example, consider that Bentham took a clear stand against slavery, as it caused suffering to unarmed humans.

[36]

Ultimately, legal positivism is even compatible with **civil disobedience**, given that the separation between law and morality might lead to the conclusion that it is morally justified to refuse to apply and to respect unjust law, despite it being the law. If Kant's assertion in general terms that a revolt against the legislator is wrong because it contradicts a categorical imperative (obey the authority who has power over you), [37] it is also

<sup>153</sup> true that he justified civil disobedience for the case 'when human beings command something which is evil in itself (directly opposed to the ethical law)'. [38] In such a case, he concluded, 'we may not, and ought not, obey them'.

On the other hand, it is evident that the **doctrine of natural law** can be read as the expression of rational criticism of public power, essentially founded on the assumptions of justice in society and of human freedom.

During the twentieth century, Leo Strauss (1899-1973) was the main instigator of the revival of ancient

natural law as a necessary balancing of the secularization of politics and the law, and therefore as a brake on their nihilistic degeneration, thus making it an essential component of political liberalism. [39]

Despite the traditional Catholic view that natural law is eternal and immutable, it cannot be questioned that its content may change throughout history. Hence, it is striking that Aristotle argued that slavery conforms to natural law (see *infra, ch 11, para 1*).

‘Those who are different [from other men] as the soul from the body or man from beast – and they are in this state if their work is the use of the body, and if this is the best that can come from them – are slaves by nature. For them, it is better to be ruled in accordance with this sort of rule, if such is the case for the other things mentioned’. [40]

Moreover, the invitation to overcome the formalistic legality that is established by positive law has sometimes served to pave the way for political decision-making, thus legitimizing the role of a single man or political party as direct interpreters of the will of the people.

During the dark times of the Weimar Republic in Germany, Carl Schmitt (1888-1895) (see *supra, ch 1, para 1*) opposed the substantial legitimacy

(*Legitimität*), constituted by the people's plebiscitary will, to the formal legality (*Legalität*) of the parliament, based on mere procedural regularity and neutrality with respect to the opposed interests at stake.<sup>[41]</sup> This harsh critique of political liberalism and of the rule of law which constituted its institutional manifestation, was in line with the dictatorial developments of the authoritarian regimes that were being established in Europe.

## 5. The renaissance of natural law after World War II

After World War II, it became quite evident in continental Europe that legal positivism had proven impotent to prevent authoritarian regimes from taking over civil societies and from causing the death of millions of victims: not only did soldiers die on the battlefield but also innocent civilians, deliberately annihilated ‘in accordance’ with laws issued by legitimate authorities.

According to the much-cited dictum of one of the major German thinkers of the twentieth century, **Theodor Adorno** (1903-1969), ‘to write poetry after Auschwitz is barbaric’. [42] In a similar way, legal science was compelled to face the ‘unbearable’ thought of a total defeat of law and, therefore, of the impossibility of a continuation of the previous rule of law after the Holocaust (*Sho'a*).

Shortly afterwards, the problem of unjust law was evident again in the United States with particular reference to the issue of racial discrimination against black people and became the subject matter of the passionate letter dated 16 April 1963 that **Martin Luther King Jr** wrote from Birmingham jail.

In the letter, he wrote that: ‘One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws.

I would agree with St. Augustine that  
“an unjust law is no law at all”. [43]

Thus, legal science was faced with a dramatic urgency to radically change its paradigms.

The question of the citizens’ bearing towards unjust law was expressly addressed by a German philosopher of law, **Gustav Radbruch** (1878-1949), who, in 1946, made an attempt to hold legal positivism good, but nonetheless to draw a line beyond which obedience of the law had to be dismissed. These reflections led to the so-called Radbruch formula:

The conflict between justice and the reliability of the law should be solved in favor of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered “erroneous law”. It is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content; however, another line of demarcation can be drawn with rigidity: Where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a

statute is not just “erroneous law”, in fact is not of legal nature at all. That is because law, also positive law, cannot be defined otherwise as a rule, that is precisely intended to serve justice. [44]

Radbruch’s formula goes so far as to argue that, if it departs from justice in an intolerable way (**test of unbearableness**, *Unerträglichkeitsthese*), positive law is no longer to be considered as law and therefore it cannot and must not be applied or complied with. [45] This result amounted to the legal basis that allowed the Nuremberg trials to obtain criminal convictions for those who had become complicit in the acts committed by the Nazi Party, [46] in particular as regards the so-called ‘final solution’ that led to the deportation and extermination of European Jews. [47] More recently, the Radbruch formula was resorted to in German ‘border guard cases’, involving East German soldiers who were charged with homicide because they had killed fugitives or other trespassers on the border between former East Germany (*Deutsche Demokratische Republik*, DDR), or East Berlin, and West Germany (*Bundesrepublik Deutschland*). [48]

Charged with homicide after the reunification of Germany (*Wiedervereinigung*) of 3 October 1990, these soldiers claimed to have acted according to the instructions they received from their superiors

(who were similarly brought to trial). Nevertheless, they were found guilty and sentenced to prison terms by German courts of first instance, as well as by the German federal court (*Bundesgerichtshof*),<sup>[49]</sup> on the grounds of both the Universal Declaration of Human Rights and the Radbruch formula.

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Although an extreme example of the realm of intolerable injustice, in the above-mentioned cases a strong version of natural law is embraced, whereby natural law prevails over positive law. This solution was openly criticized by Herbert L.A. Hart in a paper of 1958,<sup>[50]</sup> which sparked a lively polemical debate with Lon L. Fuller (1902-1978).<sup>[51]</sup>

In continental Europe, however, the major input to a critical revision of legal positivism came from the wave of constitutional charters which were gradually adopted after World War II. In fact, these documents not only provided for protection of human rights but also for standards of substantive justice, thus incorporating typical issues of ‘natural law’ and making them coexist with ‘positive law’.<sup>[52]</sup>

A provision contained in the German Constitutional Charter (*Grundgesetz*) adopted in 1949, is particularly remarkable in this respect, as it mentions *Gesetz* (legal provisions) and *Recht* (law) side by side, thus implying that, although

normally coinciding, they are not one single concept. Particularly, article 20(3) GG provides that: ‘The legislature is bound by the constitutional order, the executive and the judicature are (bound) by legal provisions and law’ (‘*Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden*’).<sup>[53]</sup> This proposition recalls the formula *iura et leges*, stemming from the Roman law.

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## Glossary

## Biographies

## CHAPTER 6

### Legal rules, principles, systems

- The structure and scope of rules
- The division of mandatory and default rules
- The legal system: gap-filler devices and settlement of antinomies
- The principles of law

According to the doctrine of normativism, law is a set of rules, each of them characterized by a conditional structure following the ‘IF-THEN’ approach: IF a ‘state of affairs’ occurs, THEN a ‘sanction’ is applied. A staple of legal rules is their generality and abstractness. A rule is ‘general’ insofar as it applies to anyone finding herself in the state of affairs envisaged by the IF-clause. A rule is ‘abstract’ insofar as it is applicable to whatever event or conduct matches the state of affairs envisaged by the IF-clause. Exceptional rules may contravene the principle of equal treatment.

Most private law rules may be set aside via an agreement between their addressees (default rules), whereas most public law rules apply irrespective of any agreement between their addressees (mandatory rules).

Primary rules are aimed at sanctioning some human actions and steering others. A legal system also requires secondary rules, which provide dynamism, certainty, and efficiency of the law.

A legal system is dynamic thanks to the sources of law, which over time create new rules, or change or repeal those already existing.

A legal system is certain and efficient thanks to gap-filler devices (analogy, judge-made law) and the criteria for solving antinomies.

Principles can be defined as guidelines that express and guarantee the overall rationality of a legal system. They carry out an interpretative function, a supplementary function and, to a minor extent, a corrective function as well.

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## <sup>167</sup> 1. The legal rules

### 1.1. The conditional structure of rules

According to the tenets of legal positivism (see *supra*, ch 3, para 1; ch 5, paras 1 and 3), law consists essentially of rules. This description of law, which is known as **normativism**, can be qualified as idealistic, in that it conceives of law as an objectively existing reality that can be ascertained in itself, beyond practical cases or concrete judicial decisions.

This view of law has been radically challenged by the Scandinavian legal realism.<sup>[1]</sup>

According to Alf Ross (1899-1979), law must be conceived as a set of beliefs, psychological suggestions, and social conditioning, which leads the judge to make one decision instead of another.

In this way, law is substantially reduced to a fact and its application

consists merely of its imposition by the judge (or by another officer), as claimed by Karl Olivecrona (1897-1980).

During the first historical stage of normativism, legal rules were conceived as commands issued by a sovereign and backed up by threats of a harm, to be inflicted upon those who disobey (**imperativism**) (see *supra*, ch 5, paras 3-4). This concept of law was theoretically framed by **John L. Austin** (1911-1960) (see *supra*, ch 5, para 3). [2]

During the twentieth century, however, the imperativist conception of law advocated by Austin was severely criticized, [3] not least because it was argued to still contain several traces of subjectivism and because it did not adequately explain the distinction between a norm and an arbitrary imposition made through a threat. Furthermore, it implied that sovereign power was exempted from abiding by law (*legibus solutus*), and did not explain how, in the modern *Rechtsstaat* (see *supra*, ch 1, para 2), law is also binding for the legitimate authority that issued it (see *supra*, ch 5, paras 3-4).

In one of the most famous legal works of the twentieth century, named *Reine Rechtslehre*, [4] **Hans Kelsen** (1881-1973) (see *supra*, ch 5, para 3) stated that, contrary to what a layman might sense, a norm may not properly be embedded in a commandment such as: ‘Thou shalt not kill’. This kind of absolute imperative may be appropriate

for religion or morality but not for law.

The reason is that law conveys a coercive social order, whereas religion binds only those who believe in it and morality only those who accept it.

According to Kelsen's doctrine, therefore, a norm

<sup>169</sup> is such not because it stipulates a command, but because it stipulates the (**secondary**) **sanction** to be applied in case the (**primary**) command is disobeyed by someone.

This is a theory of law that the author depicts as **pure** (*reine*), because it makes possible to keep law clearly severed from other prescriptive social phenomena (first of all from morality) (see *supra*, ch 5, paras 3-4).

Moral rules have in fact the structure of categorical imperatives (according to Kant's model), which are devoid of any (legal) sanction.

A legal rule is therefore to be brought back to the following logical scheme: IF a 'state of affairs' occurs (ie an act is carried out, an event takes place, and so on), THEN someone will be burdened with a 'sanction' (ie conviction, fine, and so on). Adopting linguistic terminology, a legal rule is therefore shaped as a hypothetical independent period, the protasis of which (ie the IF-clause) consists of a **state of affairs** and the apodosis of which (ie the THEN-clause) consists of a sanction.

Since this conception of normativism is based on

the logical structure of legal rules and on their definition in linguistic terms, it can be termed as ‘formalistic’.

‘State of affairs’ means any occurrence of the same sort, consisting either in a natural event or in a human act (see *infra*, ch 9, para 1). By ‘sanction’, reference is made to a punishment meted out by an official acting within her authority, be it a judge, a policeman, a major, etc.

The term (and the concept of) ‘sanction’, utilized by Kelsen, shows that his theory is mostly moulded on public law, rather than on private law (see also *infra*, ch 7, para 1). More generally, it would be preferable to talk of ‘legal effects’, ie a change in someone’s rights or duties (see also *infra*, ch 10).

The ‘sanction’ is triggered by the ‘state of affairs’ envisaged by the norm. To put it differently, it is the norm that attaches a (negative) reaction of the state to a possible event or conduct.

IF a contract is breached by one of the parties that have entered into it,  
THEN that party will be deprived of her rights towards the other. IF a good is stolen, THEN the thief will be convicted or condemned to give it back and to compensate the owner for the damages suffered.

In order to refer to such an IF-clause, German

jurisprudence of the nineteenth century coined a specific term, deriving it from the expression of *facti species*, which frequently appears in the sources of Roman law. In Latin, the expression *facti species* meant ‘appearance of the fact’, ‘phenomenon’, or ‘hypothetical fact’, or ‘model fact situation’. It was rendered in German as *Tatbestand*, a word that has a similar meaning, ie the state (*Bestand*) of the fact (*Tat*). From German, the term was introduced into Italian, where it was easily transposed as *fattispecie*, drawing this term back from the Latin.

<sup>170</sup> By contrast, common lawyers do not base their legal reasoning on ‘model fact situations’, so that their terminology is here at a loss. Nevertheless, the term ‘state of affairs’ can be adopted in this context, also drawing on Anglo-American studies in jurisprudence developed since the mid-nineteenth century on the topic of rights (see *infra, ch 10*).

A norm regards a state of affairs by describing a natural event that might take place (an earthquake, someone’s death, etc.) or by human conduct which someone might carry out (ie entering into a contract, committing a tort, etc.).

## 1.2. The scope of rules: their generality and abstractness

Legal rules are characterized by two elements, ie generality and abstractness, which may eventually be brought back to a common root. Although not necessarily coincident, in fact, both may be held to be underpinned by the same precept, ie that of equal treatment (“treating like cases alike”).

A rule is **general** insofar as it applies to anybody who finds herself in the state of affairs envisaged by the IF-clause contained therein.

One could take the following example: IF a good is stolen, THEN the thief shall be convicted or condemned to give it back and to compensate the owner for the damages suffered.

This norm does not provide for the fact that a good is stolen by a given Titius or Caia but for the fact that a good is stolen by anybody. It is therefore applicable to anybody stealing a good, provided that her conduct matches the state of affairs envisaged by the IF-clause.

In other words, a norm is a rule that is addressed not to specific subjects identified as such but rather to a class of subjects, ie all who happen to find themselves in the state of affairs envisaged by the IF-clause.

Therefore, a **norm *ad personam***, ie identifying one or more specific subjects as addressees, is exceptional and likely to contravene the principle of equal treatment, which generally commands a

constitutional status. At any rate, this kind of norms risks being unreasonable.

Conversely, a rule is **abstract** insofar as it applies to whatever event or conduct matches with the state of affairs envisaged by the relevant IF-clause contained therein.

The above-mentioned norm, for example, does not provide for the fact that this or that specific good is stolen but for the fact that any good is stolen.

In other words, a state of affairs provided for by a norm encompasses any possible events or actions of the kind. Any given case at issue which meets that model fact situation (for example, each theft of a book which historically takes place as a concrete fact) must be distinguished from the abstract state of affairs envisaged by a norm.

Of course, the scope of a norm might be broader or narrower without affecting its essential abstractness.

171 IF a book is stolen, THEN the thief shall be convicted or condemned to give it back and to compensate the owner for the damages suffered.

The state of affairs envisaged by this potential norm is not the theft of any good but solely of a book. Nonetheless, law takes into consideration not the theft of this or that book but of any book, so that the norm is no less abstract.

There are, however, **exceptional norms**, which by definition cannot be applied analogically (see *infra*, [ch 6, para 2.2](#)), as was already pointed out about norms *ad personam*.

### 1.3. Mandatory and default rules

Since public law pertains to the state's authoritative power, most of it consists of **mandatory rules**, which may not be set aside via an agreement between their addressees. In fact, it is not private autonomy that is paramount for public law but rather the supremacy of public interest over the interests of the individual (see *infra, ch 7, para 1*).

For example (most) rules belonging to criminal law are notably mandatory, since they punish each crime by stipulating a sanction which is not subject to negotiation with the culprit. Also mandatory are (most of) those administrative rules that regulate the exercise of authoritative and discretionary powers by the state.

Nonetheless, it shall be noted that both the administrative and the judiciary process have been more recently redesigned in order to leave room for the possibility of certain modules of negotiation with the private parties concerned.

For example, codes of criminal procedure may authorize plea bargaining between the prosecutor and the defendant. Another example: administrative authorizations are sometimes given on the basis of a binding agreement

between the administration and the applicant(s).

Conversely, nearly the entirety of private law consists of **default rules**, which may be set aside via agreement between their addressees. With particular reference to contract law, a major role is played by default rules that supplement agreements concluded by the parties. In this sense, they amount to rules of thumb.

This does not mean that private law does not provide for mandatory norms, but that they constitute a small minority (see *infra*, ch 7, para 1).

For example, under Italian law, a loan cannot be subject to interest rates above a certain threshold, since usurious interests are forbidden by article 1805(2) cc. It follows that a clause setting an interest rate above said threshold is void and the loan thus becomes free of charge (see *infra*, ch 9,

<sup>172</sup> para 5).

## 2. The legal systems

### 2.1. The sources of law

Herbert L.A. Hart (1907-1992) (see *supra*, ch 5, para 3) pointed out that a legal system is comprised not only of ‘primary’ rules but also of ‘secondary’ rules, which aim at identifying, changing, and enforcing the primary ones.

The ‘basic norm’, or ‘rule of recognition’, is typically a secondary rule, which aims to identify primary rules, thus ensuring the **certainty of a legal system**. Almost equally important are two types of secondary rules. Firstly, those that regulate the possible change of primary rules, thus ensuring the **dynamism of a legal system**, and, secondly, those that deal with the enforcement of primary rules, thus ensuring the **efficiency of a legal system**.

In other words, a legal system is an order of norms which proves certain, dynamic, and efficient.

In particular, the secondary rules that govern possible changes of the primary rules are commonly known as **sources of law** and play a major role in the historical development of any legal order. They stipulate what facts or acts are capable of creating new rules and of changing or repealing pre-existing rules. Each legal system is based on its own sources of law, which are not

effective as such in any other legal system.

Just as a door ‘is’ closed does not imply that it ‘ought to’ be closed,<sup>[5]</sup> the fact that a certain conduct is regularly carried out by an overwhelming majority of people does not imply that it corresponds to a legally binding rule (see *supra*, ch 5, para 3).<sup>[6]</sup>

Consequently, the very foundation of legal positivism requires acknowledgement of some kind to distinguish legally binding rules (ie the norms) from other rules that, however rooted in societal mentality and intercourse, are not legally binding.

According to Kelsen’s theory, this test could rest solely on the origin of a norm, ie the process that political institutions must go through to adopt it. On the contrary, the content of a norm, particularly the degree of inner justice which it entails, would fail as a criterion of its **validity**, ie its existence as a legally binding rule.

By way of example, a text is legally binding as a judgment if, and only if, it has been rendered by a court pursuant to the civil procedure norms of a state (the plaintiff must be summoned in a certain way, the judge must be competent for that kind of dispute, etc.). In turn, civil procedure norms are legally binding if, and only if, they have been

<sup>173</sup> enacted by parliament pursuant to the constitutional norms that establish and govern the process of enactment of statutes (for example, majority rule, promulgation by the president of

the state, publication in an official gazette, etc.).

Therefore, each norm owes its validity to another norm, which governs and regulates the procedure through which the former is enacted.

In other words, norms are stacked in a hierarchical order (*Stufenbau*), where each of them depends on the ones positioned above it. A norm is valid if, and only if, it pertains to such a hierarchical order, termed as **legal order** (or **legal system**).

Significantly, however, Kelsen himself admitted that: ‘A norm that is not obeyed by anybody anywhere, in other words, a norm that is not effective at least to some degree, is not regarded as a valid norm. A minimum of effectiveness is a condition of validity’. [7]

The most difficult aspect of such a theory of law is identifying the norm sitting at the top of the pyramid, ie the starting point from which this line of norms hangs and begins to descend downwards. Kelsen calls such a norm a ‘**basic norm**’ (*Grundnorm*). Its peculiarity is that it is not essentially positive, but that, it embodies a general acknowledgement of the binding force of rules by the members of a society. The Kantian foundation of Kelsen’s theory is evident, since the *Grundnorm* is essentially a categorical imperative, which requires one ‘obey the authority who has power on you’ (see also *supra*, ch 5, para 3).

In the version of normativism proposed by Hart, the **rule of recognition** is conceived as ‘a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts’. [8] It consists therefore of a set of social practices, which enjoy common acceptance by members of a group (**conventionalism**).

In his postscript replying to Dworkin’s criticism (see *supra*, ch 5, para 3, and *infra*, ch 6, para 3), Hart introduced a major amendment to this merely conventional version of legal positivism. In fact, he admitted and even emphasized that, besides its pedigree, the conventional rule of recognition for a norm may well also incorporate principles of justice or substantive moral values. [9] Therefore, Hart’s theory of law has been defined as ‘soft positivism’ (and Hart himself ultimately accepted this definition), [10] or ‘inclusive’. [11]

Hart’s correction was decisively rejected by Joseph Raz (see *supra*, ch 5, para 3), who operated from the conception of authority as a service to its subjects. [12] It implies that the addressees of the rule must be able to apply it without the need to renew those fundamental evaluations, something that rests on the authority to do in their place. [13] It follows that any moral assessment

cannot, and should not, be relevant for identifying the rule applicable to a case, since it is a matter of competence for the authority and not for the legal interpreter.<sup>[14]</sup>

According to a traditional claim of positivism, a legal system is both complete and consistent. It is **complete**, in the sense that no gaps (*lacunae*) can be encountered in its primary rules, since they regulate any relevant case. It is **consistent**, in the sense that no contradictions can be encountered in its primary rules, since each relevant case leads to just a single legal outcome.

It is, however, undeniable that, if taken statically and synchronically into consideration, any legal system is incomplete (ie with gaps existing in its primary rules) and inconsistent (ie with contradictions existing in its primary rules). The point is, however, that every legal system comprises some secondary rules that are designed to fill in such gaps (see *infra*, ch 6, para 2.2) and others that are designed to solve such contradictions (see *infra* ch 6, para 2.3). A legal system is therefore only both complete and consistent from a dynamic and diachronic viewpoint.

## 2.2. The gaps (lacunae) and the devices to fill them

Gaps in primary norms (lacunae) may be filled by secondary rules authorizing judges either to create new rules of law or to extend the scope of the ones already in place.

According to a well-established view, the first option has been adopted by Anglo-American jurisdictions, given that the declaration theory of common law has been set aside over time as unsound and fictitious (see *supra*, ch 4, para 4; *infra*, ch 7, para 3.2). Hart's claim that gaps in law are filled by judges' discretion has proved particularly influential in this line of reasoning. Under this argument, the judges exercise a genuine law-making power, though interstitial. [15]

This assumption has been sharply contended by Ronald Dworkin (1931-2013) (see *supra*, ch 5, para 3), who considers it unrealistic (because lawyers' and judges' discourses deal with the application of law, not judiciary law-making), undemocratic (because judges, or at least some of them, are not elected by the people and are not held accountable towards them), and unjust (because judge-made law would apply retrospectively to a case existing prior to such law being made). Dworkin's point is that no gaps in law really exist, but that there are 'hard cases', ie cases which

cannot be adjudicated on the basis of ‘explicit’ law. Judges should decide them by resorting to ‘implicit’ law, ie to principles, which would constitute the ‘preinterpretive’ basis of adjudication (see *supra*, ch 5, para 3; *infra*, ch 6, para 3).<sup>[16]</sup>

By contrast, civil law jurisdictions have adopted normative devices to extend already existing law to unregulated cases. They are gathered under the institution of analogy.<sup>[17]</sup>

At the first level of analogy, gaps are to be filled by applying legal rules that govern similar cases or similar matters (*analogia legis*). Criminal law and exceptional norms are, however, not to be applied analogically. As a matter of fact, the exceptional character of a norm implies that it provides for cases not similar to any other or that it contravenes the general principles of law (see *supra*, ch 6, para 1.2). Therefore, such a norm does not even fulfill the very basic requirement of analogy.

If no rules that govern similar cases or similar matters are found, general principles of law (see *infra*, ch 6, para 3) are applied directly to the unregulated case (*analogia iuris*).<sup>[18]</sup>

The first to resort to this approach was the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) of 1811, which in § 7 explicitly mentions natural law principles as

the final criterion to decide a case not taken into account by specific legal provisions ('If a case cannot be decided on the basis either of the words or of the natural sense of a statute, consideration must be given to similar cases, which are decided precisely in the statutes, and to the grounds of other related statutes. If the case appears still doubtful, it must be decided according to natural principles of law with regard to carefully collected and meticulously considered circumstances'). [19]

That model was followed by the Civil Code of the States of His Majesty the King of Sardinia of 1838 (article 15 of the Introductory Chapter), then by the first Italian Civil Code of 1865 (article 3 of the Preliminary Provisions) and finally by the current Italian Civil Code of 1942, where article 12(2) of the Preliminary Provisions stipulates that: 'If a dispute cannot be decided by a specific provision, the provisions governing similar cases or similar matters are to be taken into account; if the case still remains doubtful, it is decided according to the general principles of the legal system of the State'. [20]

In a much more explicit manner, the Spanish Civil Code (*Código civil español*) of 1889 regulated the matter in article 1 of its Introductory Chapter (*Título preliminar*), which did not hesitate to

include general principles among the sources of Spanish law (paragraph 1: ‘The sources of the Spanish legal system are the statutes, custom and the general principles of law’),<sup>[21]</sup> although it immediately adds that they are applicable only when there is no specific rule in a statute and no appropriate custom (paragraph 4: ‘General principles of law may be applied in the absence of statutory law or custom, without prejudice to the informing nature of the legal system’).<sup>[22]</sup>

Some national jurisdictions resort to a combination of analogy and discretion by judges.

A prominent example is article 1(2-3) of the Swiss Civil Code (*Zivilgesetzbuch*), which stipulates: ‘In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator’.<sup>[23]</sup>

## 2.3. The conflicts of norms (antinomies) and the criteria to settle them

Inconsistencies in primary norms, traditionally termed **antinomies**, may be solved by secondary rules authorizing judges to apply only one of the colliding primary norms, which is to be identified on the basis of criteria given by law.

The first possible criterion stipulates that, if a norm, which is subordinated according to the hierarchical order of a legal system (see *supra*, ch 6, para 2.1), collides with another, which is superordinate, the latter prevails over the former (*lex superior derogat inferiori*) (**hierarchical criterion**).

In case the first criterion fails, because both colliding norms are set at the same level of the hierarchical order, then a second possible criterion, based on the content of the norm, can come into play. This criterion stipulates that, if a norm, which has a broader scope, collides with another, which has a narrower scope, the latter prevails over the former (**content-based criterion**).

If the second criterion also fails, due to the fact that both colliding norms are set at the same level of the hierarchical order and their scope has the same width, then a third possible criterion is deployed. This criterion is based on time and stipulates that, if a norm which was enacted earlier collides with another, which has been

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enacted later, the latter prevails over the former (time-based criterion).

To some extent, the content-based criterion and the time-based criterion are to be coordinated.

If a norm enacted later has a scope that is narrower than that of another norm enacted earlier, the former is seen as a special norm that derogates from the latter, which nonetheless is still in force as a general norm (*lex posterior specialis derogat priori generali*). In other words, the enactment of a special norm shrinks the scope of a pre-existing general norm.

If a norm enacted later has the same or a large scope than that of another norm enacted earlier, by contrast, the latter is repealed by the former.

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### 3. The principles of law

Developments in general theory of law have shown that, in order to exhaustively describe a legal system, rules as a concept must be accompanied by **principles**, which are the guidelines that express and guarantee rationality in law.

According to the conception outlined by **Josef Esser** (1910-1999), principles do not provide for an instant fact and therefore, unlike norms, they do not directly apply to practical cases. [24]

Nevertheless, it is now generally recognized that principles have an actual preceptive content. [25]

On that basis, it is still debated whether principles are a particular species of rules or whether they differ radically from the latter and constitute a category of their own. More generally, it is disputed whether the recognition of principles can take place within the conceptual framework of legal positivism, even if broadened and mitigated, or whether that recognition must be overcome (see *supra*, ch 5, para 3; ch 6, para 2.1). [26]

From a functional point of view, principles are the most reliable tools not only to systematically reconstruct but also to critically examine the reasons justifying the remaining legal norms, which are usually characterized by a lower degree of generality. In particular, principles are relevant

in the interpretation of statutory law, since they represent a systematic basis and substantial explanation of the legal rules set out by the legislator (**interpretative function**). [27]

<sup>178</sup> At least under certain conditions, legal principles are also utilized by judges and other officials to fill gaps in a legal system (**supplementary function**) (see *supra*, ch 6, para 2.2). [28] Finally, when they are mandatory, principles can even call into question the validity or effectiveness of another legal norm; or, at least, limit its application in a restrictive manner (**corrective function**). [29]

In civil law jurisdictions, one of the most characteristic principles of private law is undoubtedly the one of **good faith**, especially in the domain of contracts and obligations (see *supra*, ch 4, para 1; *infra*, ch 8, para 1.2.1).

According to the definition given in article I.-103 (*Good faith and fair dealing*) of the **Draft Common Frame of Reference** (see *infra*, ch 8, para 3), '(1) The expression “good faith and fair dealing” refers to a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question. (2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party’s prior statements or conduct when the other party has reasonably relied on them to that other party’s

detriment'. According to the traditional conception, the principle of good faith, which is historically derived from the *iudicia bonae fidei* of Roman law, is alien to common law jurisdictions.

In the US, however, paragraph 1-304 of the Uniform Commercial Code (see *supra*, ch 3, para 5) states that '[e]very contract and duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement'. According to paragraph 205 of the Restatement (Second) of Contracts (*Duty of Good Faith and Fair Dealing*), furthermore, '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'.

In England, a particular concretization of the principle of good faith has traditionally been recognized in relation to insurance contracts, qualified by common law as *uberrimae fidei*, which literally means 'of utmost good faith'.<sup>[30]</sup> More recently, a more general openness to the application of such principles to long-term relational contracts has been observed, such as joint venture agreements, franchise agreements, and long-term distributorship agreements.<sup>[31]</sup> This trend seems to be supported by subsequent case law concerning other long-term contracts.<sup>[32]</sup> Nevertheless, there is no shortage of

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rulings to the contrary,<sup>[33]</sup> which find that the principle of good faith cannot be generally applied to all commercial contracts.<sup>[34]</sup>

Although principles can be directly formulated by **constitutional norms** (see *infra*, ch 7, paras 3.1 and 3.2), there is no exhaustive catalogue in the legislation that encapsulates and enumerates them.

During the preparatory work for the Italian Civil Code of 1942, Mussolini's government tried to shape private law to the political dictates of fascism, advocating in favor of listing general principles of law in the preliminary chapter (and interpreting them as a salient expression of the predominant ideology).

In the Pisa Congress of 1940, entitled 'I principi generali dell'ordinamento giuridico fascista',<sup>[35]</sup> the young Francesco Santoro-Passarelli (1902-1995) successfully argued against this approach,<sup>[36]</sup> and went on to become one of the most important Italian private law scholars of the twentieth century.

In fact, as far as private law is concerned, principles are generally enunciated by doctrine and jurisprudence, which derive them via the systematic interpretation of a multiplicity of single norms or homogeneous disciplines:<sup>[37]</sup>

accordingly, principles are the systematic reasons that unite and represent the logical-juridical reason for these norms and disciplines (*ratio legis*).

Principles are often expressed with reference to the Romanistic *brocarda*,<sup>[38]</sup> elaborated by medieval scholars on the basis of the *Corpus iuris civilis* (see *supra*, ch 2, para 2).<sup>[39]</sup> This explains why, in English common law, principles were formulated above all with regard to equity, the original historical formation of which was affected by Romanistic and canonistic influence; for example, ‘equity will not assist a volunteer’, ‘he who comes into equity must have clean hands’, ‘between equal equities the first in order of time shall prevail’, etc. (see *supra*, ch 2, para 4.2).

Although it is almost impossible to provide a definition of principles that is unambiguous and likely to command general consensus,<sup>[40]</sup> there is no doubt that there is a certain agreement on a number of elements that are considered to characterize principles in a particular way and that can be used to identify them in the legal system.

From a structural (or formal) point of view, it is commonly perceived that principles are characterized by the indeterminacy or vagueness of their preceptive content, which therefore is to a certain extent non-exhaustive, and always exceeds any of its specific concretizations.<sup>[41]</sup> Rules, on the contrary, entail particular precepts, subject to well-defined conditions of application.<sup>[42]</sup>

According to the conceptual approach outlined by Luigi Mengoni (1922-2001), principles prescribe an attitude, which may materialize in countless specific precepts, whereas rules prescribe a specific conduct. It follows that principles do not provide for an instant fact, since they are not contingent upon any certain event.

However, it is increasingly frequent for rules to envisage an ‘open’ or ‘indeterminate’ fact model, [43] which therefore makes more difficult distinguishing them from principles. Anglo-American doctrine refers to them as legal standards.

For example, in contemporary legal systems, tort and compensatory damages are based on the violation of a general duty of negligence, or care. [44] This is, indeed, a concept that makes the fact situation provided for by tort ‘open’ or ‘indeterminate’, so the typical (ie restricted to cases that are abstractly already predetermined by the legislator) becomes atypical.

The analysis is different in the case of a rule, which, however precise and specific, uses an elastic concept, which requires an assessment or, in any case, a factual evaluation by the judge. [45] For example, articles 49(1) (a) and 64(1) CISG state that the contract may be terminated only when its breach is ‘fundamental’. The qualification of the breach of

contract as ‘fundamental’ (or ‘material’, as often stated in analogous national legislative provisions) is a perfect example of an elastic concept, defined in article 25 CISG with reference to other elastic concepts such as the one of substantial detriment.

Furthermore, a norm may incorporate a principle within its structure,<sup>[46]</sup> so that judges are entrusted with the power to provide a discretionary solution to the specific case that falls within their scope of application. In particular, under these circumstances, the judge has the power to establish which are the prevailing interests among many that emerge whilst carrying out an activity or within a legal relationship. These interests, despite deserving legal protection in abstract terms, in practical and concrete terms are structurally and, so to speak, inevitably in conflict with each other. The best examples come from the numerous rules that specifically apply good faith to the discipline of obligations and contracts: eg the one who behaves in violation of the principle of good faith during the negotiation phase and in the formation of the contract has to pay compensation.

The terminology introduced by German doctrine<sup>[47]</sup> refers to general clauses (*Generalklauseln*),<sup>[48]</sup> which, above all, raise the problem of whether their concretization by the judge can be regarded as a question of law rather than a question of fact

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and whether it can, therefore, be reviewed from the point of view of its legality. [49] In the context of European law, a similar problem, which has been the subject of lively debate for some time (in particular in German-language literature), is the possibility of the ECJ having jurisdiction to interpret and to apply the general clauses prescribed in EU directives and regulations. [50]

According to the most consolidated thesis, general clauses constitute a ‘full delegation with unrestricted powers’ to the judge, which can determine their preceptive content through the use of extra-legal criteria, ie technical or evaluation standards taken from social morality (so-called *hetero-integration*). [51]

According to a different line of thought, the preceptive content of general clauses has to be determined by the judge through the application of legal principles (so-called *self-integration*). [52]

In reality, it is to be considered that the characteristics of generality, vagueness, and indeterminacy of preceptive content do not represent indefectible constitutive elements of legal principles but only characteristics that they have in a normal and, so to speak, regular way.

This depends on their nature as objectively rational and axiologically neutral categorical imperatives. In fact, it is clear that the more a

precept takes on a precise and determinate content, the more it departs from this reference model and it is aimed at achieving a particular purpose, to realize the interests of a party, and so on.

On the contrary, it is only appropriate for a rule to have a vague or indeterminate content in case there are particular reasons of law-making policy: [53] since they are laid down by the legislator for the achievement of a purpose that has been deliberately set, any specific and determinate precepts imposed by the rules usually serve the achievement of this purpose.

From a substantive point of view, it is commonly believed that principles derive from the **moral values** positioned at the foundations of a society; therefore, they are acknowledged to have an ethical content. [54]

Based on these premises, it was noted that, when a judge applies a legal principle, she intends to justify her decision on the basis of a moral value which already exists in the society concerned (**deontological reasoning**), rather than on the basis of some practical or political consequence that might result from the decision itself, such as, for example, prevention of illegal conduct or economic growth (**teleological, or consequentialist, reasoning**). [55]

This clearly raised the problem of how to identify the values of **social morality**. It has been argued that

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such values (could and) should be objectively ascertained and recognized by the judge regardless of any personal beliefs.<sup>[56]</sup> This stance is not easily reconcilable with the positivistic view of law, which tends to suggest that, since law does not impose its own conception of justice and of the common good, judges should ultimately refer to their own values.<sup>[57]</sup>

On the basis of such considerations, Dworkin (see *supra*, ch 5, para 3) has described the distinction between principles and legal rules as the one between two kinds of concepts that are not only distinct but also radically incompatible.<sup>[58]</sup>

From a philosophical point of view, a similar result can be observed in the refoundation of (legal) hermeneutics carried out by Hans-Georg Gadamer (1900-2002). His main work, *Wahrheit und Methode* (1960),<sup>[59]</sup> interprets hermeneutics from the point of view of existentialist phenomenology developed in Heidegger's *Sein und Zeit* (1927).<sup>[60]</sup>

Moving from this conceptual approach, it has been pointed out that rules are based on a **mechanical subsumption of the case** into a state of affairs, so that either they are applicable in all respects, or they are not applicable at all. On the contrary, principles are susceptible to a **discreet**

**application** (or, so to speak, milder application),  
<sup>184</sup> as they must always be balanced with each other and in any case, they do not tend to exclude each other according to an ‘all-or-nothing’ paradigm (see *supra*, ch 5, paras 1 and 3). [61]

In reality, principles are not meant to achieve a purpose (social, political, or even moral) that is stipulated by the legislator, but they establish themselves on the ground of intrinsic objective rationality.

In this sense, legal principles have to be distinguished from **policies**, which instead identify social or political purposes that the legislator aims to achieve and, for this reason, are constitutively characterized by a teleological or consequentialist structure (*stat pro ratione voluntas*, the will takes the place of reason). [62]

It must be considered that legal principles cannot be identified, nor criticized, from a strictly axiological point of view. Therefore, they apply regardless of the social morality professed in a certain historical, cultural, or environmental context.

In other words, the debate on legal principles can only be based on the objective **rationality** of which they are a manifestation. This does not mean, however, that they are eternal and unmutable, because in all areas of human knowledge, experience shows that reason is not self-evident; it is, rather, historically revealed through a continuous search for the truth. [63]

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**Glossary**

**Biographies**

## CHAPTER 7

### Private law and its sources

- The divide of private law and public law
- The sources of private law in civil law and common law jurisdictions
- The historical formation of commercial law and its codification
- The unification of private law
- The role of legal scholarship as a formant of law
- The dialectics between formalistic legal reasoning and realistic legal reasoning
- The advent of critical legal studies

Albeit rooted in Roman law, the divide between private and public law was introduced into French law in the first decade of the nineteenth century and, by imitation of that model, soon became a staple of civilian jurisdictions. This division affected the judiciary, since administrative tribunals were established aside from ordinary courts, but it impinged on substantive law as well, insofar as the state's authoritative powers were exempted from abiding by the ordinary rules on civil liability and contracts. Private law governs (horizontal) relationships between peers and is grounded on freedom as its overarching principle; public law governs (vertical) relationships between the state and individuals, or entities and is grounded on the resort to authoritative power as its overarching principle.

Conversely, private law is traditionally subdivided into civil law *stricto sensu* and commercial law (ie special private law addressing particularly businesses and other professionals in order to uphold their

economic activities). The Italian *Codice civile* of 1939-1942 was the first case of a unique code, embracing both civil law *stricto sensu* and commercial law (particularly, company law). This ‘unified’ model of private law was later followed by other codifications, both in continental Europe and in Latin-American countries.

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In civil law jurisdictions the Constitution is at the top of the hierarchy of the sources of law and, in the systems where it is ‘rigid’, it overrides the civil code, which is on the same footing as other legislative acts. Statutory laws are therefore subject to a constitutional test and, if they do not meet it, they can be struck down, generally by a specialized court or tribunal. Regulations issued by the government, other bodies belonging to the administration, or independent authorities, may also have a normative content, thus amounting to sources of law. Customary law can operate solely in the interstices of legislative and regulatory acts, thus playing a very marginal role among the sources of law. Aids for the interpretation of statutory (or regulatory) provisions include the following: literal rule (or grammatical interpretation); systematic interpretation; historical interpretation; and teleological interpretation. Anglo-American common law has traditionally been developing on the basis of leading cases decided by the superior courts (precedents), which, due to the doctrine of ‘stare decisis’, are binding. Therefore, it is characterized by a casuistic approach and underpinned by a tendency to develop legal reasoning bottom-up, ie upwards from the facts of single cases. Attempts to codify the common law remained completely unsuccessful in the UK; instead, they bore some fruit in the US. Since World War II, at any rate, statutory law has been increasingly gaining ground, and it has now

become predominant. In this respect, the impact of the European Union's legal system on the UK's legal system proved particularly strong. In the US private law remains overall between the preserves of each State's legislature (except for some matters, like interstate commerce); the most significant initiative to achieve a certain uniformity among the different US judicatures was undertaken through the drafting of the Uniform Commercial Code (UCC). Accordingly, the rules of interpretation of statutes evolved over time. The literal rule is still paramount but was supplemented by the mischief rule (ie corrective interpretation) and the so-called golden rule (ie antiliteral interpretation, when the wording of a provision is not clear). No judicial review of legislative acts enacted by Parliament is allowed in the UK, whilst this power was entrusted to the US Supreme Court since 1803. Administrative regulations are also a source of law in the Anglo-American systems; in the US they gained a material momentum, since they govern federal agencies' activities. Usages are acknowledged to be a source of law of last resort.

<sup>193</sup> 1. **The divide of private law and public law**

Jurisdictions of continental Europe are generally acquainted with the fundamental divide between private and public law.<sup>[1]</sup> Private and public law can be understood as two complementary

branches of each national legal system. Historically rooted in Roman law sources,<sup>[2]</sup> their distinction was elaborated over time by German and French scholars.<sup>[3]</sup> It eventually gained a positive statutory foundation in 1811, when Napoleon created **administrative tribunals** as special courts, separated from the ordinary ones; this jurisdictional duality was soon imitated by other states,<sup>[4]</sup> which adopted the French system of **administrative law**.<sup>[5]</sup>

While the distinction between private and public law has become established, although somewhat recently, also in Anglo-American jurisdictions,<sup>[6]</sup> the **solid absolutism** and the **state centrality**, which characterize the French model of administrative law,<sup>[7]</sup> have been considered incompatible with (or even repugnant to) English liberalism.<sup>[8]</sup>

According to a famous analysis by Albert Venn Dicey (1835-1922): ‘The “rule of law” in this sense excludes the idea of any exception of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the “administrative law” (“droit administratif”) or the “administrative tribunals” (“tribunaux administratifs”) of France. The notion which lies at the bottom of the “administrative law” known to foreign countries is, that affairs or disputes in which the

government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs'.<sup>[9]</sup>

Indeed, continental public law had been historically driven by the aim of exempting the state from abiding by private law, particularly in order to exonerate it from civil liability towards

196 citizens and from the binding force of contracts entered into with them. Public law has therefore been styled as a special body of rules, aimed at conferring an authoritative power (*puissance publique*) to the state, thus running contrary to the principle of equal treatment that is underpinned by private law. The reason alleged for such exemption from private law is basically that the state is seen to pursue the general interest, thus having to command a higher standing and to be treated differently than individuals and private entities, who pursue instead their own private interests.

The criteria upon which the distinction between public and private law should be based are often not neat.<sup>[10]</sup>

However, it is safe to say that private law provides a legal framework for (horizontal) relationships between peers and its overarching principle is that of liberty. At the core of private law lies the

assumption that individuals are free and entitled to decide on the regulatory regime that will govern their interests, without prejudice to the freedom of others (**private autonomy**) (see *infra*, ch 9, paras 2 and 5). Conversely, public law governs the (vertical) relationship between the state and the citizens; it is enshrined in the ‘command and control’ logic.

Therefore, private law autonomy, grounded on liberty, is opposed to public law **heteronomy**, grounded on power.

Friedrich August von Hayek (1899-1992) argued that private law provides a set of rules of conduct (*nomoi*) that govern the behavior of individuals, but do not interfere with the natural balance of society and, thus, the marketplace (*catalaxy*). On the contrary, public law is driven by specific purposes (*thesis*), all of which steer the behavior of individuals towards achieving a special interest set out by authorities.

Herbert L.A. Hart (1907-1992) focused on the perspective of those who are subject to the legal authority of a government and argued that private law consists of a set of guidelines governing free choices of individuals and entities as to their own life and assets. Public law, instead, amounts to a cluster of tolls and sanctions.

Elaborating on labor and family law, Cesare Massimo Bianca (1932-2020) takes the view that any form of private power infringes the principle of equal treatment, unless regulated for the sake of a constitutionally overarching interest. [11]

Yet, the state does not necessarily act through the exercise of its authoritative powers. It may instead decide to resort to its private autonomy and act like any other legal entity to pursue its interests. Any such act performed by the state will be governed by private law, and the state is then said to act *iure privatorum*.

<sup>197</sup> The border between private law and public law is historically contingent on political choices. [12] These are, in turn, affected by external circumstances, especially financial ones, and, as a result, the balance between private and public law can change over time. [13] Particularly, the expansion of public law is usually driven by the pressing social need to exercise the authority to control, restrict, and limit social unrest and unrestrained self-interest on the part of companies and owners. On the contrary, private law is expanded and developed when freedom of individuals and enterprise is preferred. Therefore, during wars or social uprising ‘tout devient droit public’. [14]

In general terms, legal scholars have suggested that during the twentieth century and especially after World War I, private law has dramatically changed, [15] becoming more ‘public’ or ‘social’:

[16] the radical tendency to centralize and bureaucratize the economic life was able to transform ‘what was originally considered to be governed by private law’. [17] A fundamental step of this transformation of legal systems was marked through the **constitutionalization of private law**, as well as through the introduction of collective bargaining and government intervention in the economy (see *infra*, ch 7, para 3.1). [18]

In the 1980s, however, private law ideology became dominant by far and – seemingly – gave rise to a ‘wayout’ or ‘escape’ from public law, [19] eg through a gradual decriminalization of **business law** (financial law, tax law, company law, etc.). The monopoly of the state itself in the process of lawmaking ended up being severely challenged, [20] giving leeway to new forms of ‘law beyond the state’ (see also *infra*, ch 8, para 2.1).

Subsequently, public law gained new momentum from the financial crisis which started in 2007-2008, [21] and again more recently with the outbreak of the COVID-19.

It is often argued that the distinction between private and public law was weakened – or even surpassed – by the creation of the EU (see *infra*, ch 8, para 1). [22]

While it is true that European law has introduced far-reaching liberalization policies across many industries, it is also true that such political and financial processes did not reduce the role of

administrative law, but rather expanded its remit.

[23]

In becoming European, [24] on the other hand, administrative law has experienced a tremendous change in many of its most characteristic traits.

European administrative law is no longer characterized solely by the public functionalization of private action, particularly in the field of economics. [25] It is instead aimed at pursuing primary interests protected by individual freedoms. Discretionary powers of public administration are now more limited than in traditional administrative law (see also *infra*, ch 10, para 3), and administrative proceedings are now based on the principle of legal due process.

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## 2. Commercial law and its relationship with the rest of private law

Historically, commercial law consisted of a body of trading principles used by merchants and applied by their corporations (*lex mercatoria*). The importance of maritime law gained more and more ground, and this led to a higher need to regulate risks like ship breakdown, insurance, and bottomry. Italian municipalities as well as maritime republics played a vital role in shaping such legal concepts, particularly in the banking industry.

Benvenuto Stracca (1509-1578) is historically regarded as the founding father of commercial law. In his work *De mercatura seu mercatore tractatus* (1553), he was the first to systematically analyze commercial law and separate it from civil and canon law.

Merchants' trade associations had their own **special courts**. These applied commercial and maritime law to settle disputes among their members and were free from any influence by local judges.

Established in 1258, the *Consolat de mar of Barcelona* was particularly important, because it contributed to the creation of a body of customary laws and ordinances in Catalan,

which was later published in Valencia in 1494. Similar courts had already been established in Messina (in the early decades of the thirteenth century) and Genoa (in 1250).

In continental Europe, the codification of commercial law progressed throughout the nineteenth century, in parallel with the codification of civil law. In 1807, France enacted its first *Code de commerce*, [27] which accompanied the *Code civil* of 1804 (see *supra*, ch 4, para 3.1.1); at the same time, special jurisdictions were created for commercial matters, as separated from civil courts. Similarly, the German Code of Commerce – *Handelsgesetzbuch* (HGB) – was introduced in 1897 and came into force on 1 January 1900, along with the German Civil Code (BGB) (see *supra*, ch 4, para 3.1.2); commercial courts were also introduced into the judicial system.

In 1673, Louis XIV, the then King of France, in the context of his nationalist and statesman policy, had codified French commercial law by means of an *ordonnance pour le commerce*. Jacques Savary (1622-1690) played a pivotal role in drafting it, which is why the document is also known as *ordonnance Savary* (or *Code Savary*). With some minor amendments, it was to become the *Code de commerce* of 1807. [28]

Similar advancements were achieved

a decade later in German-speaking countries united under the German confederation (*Deutscher Bund*) after the Restoration (1815). The *Allgemeines Deutsches Handelsgesetzbuch* (ADHGB) in 1861 codified the commercial legislation of the Confederate States into a code of commerce.<sup>[29]</sup> In 1868, the *Reichsoberhandelsgericht* (ROHG) was established to settle commercial disputes, having exclusive jurisdiction in German countries that were part of the *Norddeutscher Bund* by 1866.<sup>[30]</sup>

Italy followed the French model, which was based on the duplication of the code of commerce and commercial courts as distinct from civil courts.

The Code of Commerce of the Reign of Sardinia was temporarily extended to the rest of the territory (1865) until the introduction of a new code of commerce in 1882.

During the twentieth century, however, some Italian legal scholars advanced a highly influential theory that commercial and civil law should be unified to combat merchants' privileges and ensure equal treatment among citizens, thus providing a single legal framework for contracts and obligations.

This theory was strongly supported by one of Italy's most renowned commercial law scholars, Cesare

Vivante (1855-1944). He established a journal called *Rivista del diritto commerciale e del diritto generale delle obbligazioni* (1903). His ideas were followed by Tullio Ascarelli (see *supra*, ch 5, para 4) and, for some time, by Angelo Sraffa (1865-1937). Vivante eventually had a radical shift in thought and re-embraced the doctrine of autonomy of commercial law. The ideal of a **unique code of private law** was also advocated by Mario Rotondi (1900-1926).

A few decades later, the project of a single code of private law was (unexpectedly) supported by the fascist regime, while the reform of the 1865 Civil Code was underway. Italian fascism sought to prevent class conflict and was averse to the merchant bourgeoisie. At the same time, the issue of a unique code of private law was aimed at enhancing the efficiency of civil law, furthering the generalization already underway such that most commercial law rules included all citizens irrespective of their profession (commercialization of civil law). [31]

The Italian *Codice civile* of 1939-1942 eventually led to the **unification of private law** (see *supra*, ch 4, para 3.1.3). Not only did it govern civil law, but it also regulated commercial law, including company law.

The Swiss *Obligationenrecht* (OR) of 1881, [32] which later became the fifth book of the *Zivilgesetzbuch*

(ZGB) in 1907,<sup>[33]</sup> had already provided a single legal framework for obligations, where it did not distinguish between civil and commercial law.

The model of a unified private law was later implemented in the Polish Civil Code of 1964;<sup>[34]</sup> more recently, in the new (and third) Dutch Civil Code (*Burgerlijk Woetboek*) of 1992,<sup>[35]</sup> as well as in the Russian Civil Code of 1994.<sup>[36]</sup> A similar process took place also in some Latin American countries: a unique code of private law was issued by Paraguay (1985) and Brazil (2002). More recently, ie in 2014, Argentina issued a combined Civil and Commercial Code (*Código civil y comercial*), which clearly draws on the model of the Italian *Codice civile*.

In common law jurisdictions, commercial law was heavily influenced by continental civil law in two material ways. It exerted influence on that branch of commercial law that was historically administered by special jurisdictions like the Court of Admiralty (see *supra*, ch 4, para 1), which adjudicated on the basis of Roman law, as well as on that part of commercial law that was developed by Lord Mansfield (see *supra*, ch 4, para 1) throughout the seventeenth century.

In the United States, the push for a uniform commercial law resulted in the adoption of the Uniform Commercial Code (UCC) (see *supra*, ch 3, para 5).

Established in Paris in 1919, the **International Commercial Chamber** (ICC) was instrumental in developing and applying uniform commercial law globally.<sup>[37]</sup> One of its objectives is to collect and publish the **International Commercial Terms** (INCOTERMS),<sup>[38]</sup> ie commercial best practices and standard contract clauses, most notably in the context of international sales and trade of goods. They were first published in 1936 and have, since then, been revised from time to time.<sup>[39]</sup>

Commercial law has expanded to include antitrust law, intellectual and industrial property law, business-to-business contract law, company law (see *infra*, ch 11, para 1.2.1), bankruptcy law, and debt instruments (such as promissory notes and bank cheques). Most of these fields have been significantly unified by the European Union (see

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<sup>202</sup> *infra* ch 8, paras 1.5.1 and 1.5.2).

### 3. The legislature and the judiciary

#### 3.1. Civil law jurisdictions

In civil law countries, the prevailing source of law is the statutory legislation, ie a set of written legal statutes issued in accordance with constitutional forms and procedures; national **civil codes** are to be found among those legal statutes and serve to draw up general principles and rules of private law (see *supra*, ch 4, para 3). By contrast, **case law** (or **judge-made law**) is not considered a formal source of law, [40] but, rather, a measuring rod for how laws are actually interpreted, as well for their level of effectiveness; namely, how laws are applied and enforced within society.

The fact that a legal rule is valid, ie it is formally in force and created by way of a legislative act, does not necessarily mean that it is also effective, ie it is actually applied and followed in practice. The **validity** of legal provisions must be therefore distinguished from their **effectiveness** (see *supra*, ch 6, para 2.1). This may lead to a dissociation between the law written in statutes and that applied (or eventually made) by judges (see *supra*, ch 3, para 3.2).

At any rate, it must be taken into consideration

that the precedents of the higher courts may be held to be highly persuasive in civil law jurisdictions and, therefore, they may tend to be followed by other courts. [41]

The **Constitution** is ranked at the top of the hierarchy of the sources of law (see *supra*, ch 6, para 2.1). Although usually enshrined in a charter, it tends to be considered as ‘pre-existing’ the state, rather than ‘stipulated’ by the latter. In this vein, it coincides with the *Grundnorm*, ie the rule of recognition of the entire legal system (see *supra*, ch 6, para 2.1), which incorporates material values that may be conceived of as a positivization of natural law (see *supra*, ch 5, paras 1 and 3).

In most jurisdictions of civil law, the **Constitution** is ‘rigid’. It means that the Constitution cannot be amended through ordinary legislative acts; it can only be modified through a specific procedure of constitutional review. Such special procedures generally include a complex system of Parliamentary voting that is sometimes followed up by a popular referendum. In addition, a constitutional court or tribunal may be designed to ensure the supremacy of the Constitution over other sources of law, namely acts of Parliament or other legislative acts.

The Constitution usually governs how legislative acts should be voted on and issued by the Parliament. Scholars have raised the question of whether constitutional laws should not only apply to vertical relationships between the state and its

citizens but also to horizontal relationships between individuals or entities (see also *supra*, ch 203 7, para 1). The horizontal application of constitutional laws is also known by the German term *Drittewirkung* and is still highly debated, as it may restrict the freedom of individuals (for example, when entering into a contract).

Conversely, it is a widely accepted fact that private law is now in the process of being ‘constitutionalized’, particularly when it comes to its interpretation and application by courts. Every provision of private law must be construed and applied in accordance with the Constitution, especially regarding the protection of fundamental human rights.

Important methodological and dogmatic considerations came from Claus-Wilhelm Canaris and, in the area of labor law, from Hans Carl Nipperdey (1895-1975).

In Italy, the Constitution-theory advanced by Pietro Rescigno is primarily based on the valorization of intermediate communities and pluralism. In turn, Pietro Perlingieri offered a systematic reinterpretation of private law that is founded on the constitutional protection of individuals and the supremacy of their fundamental rights over property rights.

As far as private law is concerned, sources of law tend to attribute primacy to civil codes. This

perceived primacy, however, concerns only the systematic centrality of civil codes, not their formal force as sources of law: in this respect, they are on the same footing with other legislative acts. The same holds true for other codes across continental European jurisdictions, most notably those concerning commercial law and civil procedure.

The central role of the civil code within continental European jurisdictions did, however, come into question in the 1970s. During that time, there was a great number of legislative acts of Parliament (known as ‘special statutes’) governing special or exceptional regimes outside the remit of the civil code to protect certain social or political interests, leading to a substantial limitation of the scope of application of the civil code.

Natalino Irti coined the term ‘decodification’, which became popular during the 1970s and afterwards. The term conveyed the concept that the civil code was becoming less and less important and being replaced by a number of legislative acts, each having its own independent legal force. There was indeed a shift from the systematic analysis of private law to a new critical interpretation of the sources of law based on special laws.

Also administrative regulations issued by the

government, other bodies belonging to the administration, or independent authorities may have a normative content. Should this be the case, however, they must be authorized by a statutory provision and cannot overstep the limits of that authorization, nor override any other statutory provision. In the hierarchical order of the sources of law (see *supra*, ch 6, para 2.1), regulations are therefore subordinate to legislative acts.

<sup>204</sup> Legislative and regulatory acts fundamentally consist of documents, the terms of which need to be interpreted to determine their legal significance. Case law plays a pivotal role in the interpretation process.

Despite attempts by lawmakers to regulate the **interpretation of statutes** (and regulations), it is legal scholars who have guided it from a scientific and doctrinal perspective. [42] The civilian canon of aids to interpretation was elaborated upon by Friedrich Carl von Savigny (see *supra*, ch 4, para 3.1.2) and entails the following arguments:

1. **Grammatical (or literal) interpretation:** the interpreter sticks to the wording of the relevant provision and accords their own interpretation to the plain text of it;

2. **Systematic interpretation:** the interpreter derives the meaning of the provision so that it is consistent with the rest of the legal system, including its own rules and principles;

3. **Historical interpretation:** the interpreter draws on the objective intention of the lawmaker (*mens legis*), as it is laid down in

preparatory works, ‘whereas’ clauses, explanations of vote, etc.; 4. **Teleological interpretation:** the interpreter construes the policy underpinning the rule and may even disregard the declarations of lawmakers; this aid to interpretation allows the interpreter to carefully narrow (reductive interpretation) or broaden (expansive interpretation) the scope of a statutory provision. [43]

In Germany, courts and legal scholars do not only contribute to the interpretation of law (*Auslegung*) but also to the **development** (or **supplementation**) of law according to renovation of social values (*Rechtsfortbildung*). This serves as a solution to practical issues that are not addressed by lawmakers. This is traditionally the core tenet of legal methodology (*juristische Methodenlehre*). [44]

Statutory laws are subject to the **constitutional test.** If an act of legislation can be interpreted both in accordance with and in contrast to the Constitution, the interpreter has to choose the former interpretation. If an act of legislation has no meaning that is in accordance with the Constitution, in almost the entirety of civil law jurisdictions it may be struck down (**judicial review**), generally by a specialized court or tribunal.

Across the Member States, the criteria of

interpretation of national laws and the constitutional test, however, are overridden by the principle of compliance with the European Union's law. This reflects the supremacy of European law over national laws (see *infra*, ch 8, para 1.3).

Customary law plays a marginal role (see also *supra*, ch 2, para 2), and it is considered as a source of law solely in those areas where its authority is recognized by law (*usages secundum legem*). Furthermore, customary law is tacitly applicable in those areas which are not governed by law (*usages praeter legem*). By contrast, customary laws that are in contrast with existing laws (*usages contra legem*) are illegitimate and, thus, unenforceable.

Customary law is defined as a body of legal facts. Although it is not constituted by legislative acts passed by the state, customary law is recognized by the state as binding. Official gazettes collecting customary law, which are sometimes kept, represent legal repositories rather than sources of binding law.

Traditionally, two essential requirements must be met for a usage to be acknowledged as a source of law.

The first requirement – material or objective in nature – is that a number of individuals must observe a certain pattern of behavior on a recurrent basis. The second one, with a psychological or subjective nature, is that the

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relevant actors consider such conduct to be legitimate or at least in accordance with law (*opinio iuris ac necessitatis*).

As was mentioned earlier, customary law lies at the bottom of the hierarchy of sources, and cannot modify or repeal any laws derived from other sources. Most importantly, customary laws cannot repeal or modify a legislative act



### 3.2. Common law jurisdictions

Anglo-American jurisdictions are largely based upon case law (or judge-made law).

The traditional explanation of the role thus played by common law courts in the process of lawmaking was fathered by William Blackstone (1723-1780) (see *supra*, ch 2, para 5), according to whom the judge ‘is not delegated to pronounce new law, but to maintain and expound the old one’:<sup>[45]</sup> the judgments of common law courts would actually do nothing more than ascertain and declare the already pre-existing law, thus bringing it into the light (**declaration theory of the common law**).<sup>[46]</sup> However, this doctrine has been discredited over time by modern lawyers, most prominently by John L. Austin (1911-1960) (see *supra*, ch 5, para 3; ch 6, para 1.1),<sup>[47]</sup> and it has eventually come to be considered unsound and fictitious (‘we do not believe in fairy tales any more’).<sup>[48]</sup>

Therefore, it is nowadays widely assumed that, in Anglo-American jurisdictions, judicial decisions amount to a proper source of law. The question of

<sup>206</sup> the nature of common law, however, cannot be considered as a remnant of the past: particularly, it is still discussed with regard to the nature of the courts’ power, when it comes to gap-filling devices (see *supra*, ch 6, para 2.2) and to adjudicating ‘hard cases’ (see *supra*, ch 6, para 3).

It has been convincingly claimed that, in Anglo-American jurisdictions, judicial decisions consist of **provisional statements of general (or fundamental) principles**, which have to be reviewed and developed on a case-by-case basis; [49] by contrast, provisions of civil law codifications are styled as large and abstract generalizations, endowed with a would-be eternity. In other terms, common lawyers ‘tend to reason *upwards* from the facts of the cases’ brought to a court, whereas civil lawyers ‘tend to reason *downwards* from abstract principles embodied in a code’. [50]

The supremacy of judge-made law and its casuistic approach inevitably led common law jurisdictions to risks of inconsistencies and inequalities, due also to a piecemeal attitude of judges and interpreters. Therefore, it was necessary to seek devices that could remedy – or at least alleviate – this serious inconvenience.

Between the sixteenth and the seventeenth centuries, the decisions rendered by the Exchequer Chamber, which gathered judges belonging to all the three central courts of common law (ie the Court of Exchequer, the King’s Bench and the Court of Common Pleas), began to be considered binding. By the end of the seventeenth century, this attitude became a principle. Similarly, the judgment of the Equity Court began to have binding force at

that time.<sup>[51]</sup>

During the nineteenth century, it was eventually considered a rule that a single precedent has an absolute binding force for a lower judge (**vertical precedent**). It was also established that it also has an absolute binding force for the same judge who rendered it, or for another court at a similar level (**horizontal precedent**);<sup>[52]</sup> this rule, however, is looser than that on vertical precedent and, at any rate, is observed by US courts less than by UK courts<sup>[53]</sup>.

The doctrine of *stare decisis* was thus established and is nowadays regarded as a staple of common law (including equity).<sup>[54]</sup>

The binding force of a precedent properly regards its **holding** (or *ratio decidendi*), ie the point or the

<sup>207</sup> points of law on which the court rested – or, in a stricter version, had to rest – the disposition of the case. The remaining part of what is said in a judicial decision is called *obiter dictum* and does not fall within the scope of the doctrine of *stare decisis*.<sup>[55]</sup>

A precedent ceases to be binding if and when a higher judge assesses it as unsound and wrong (**overruling**).<sup>[56]</sup>

Furthermore, a court is not bound by a precedent insofar as it acknowledges that it is hearing a case which is substantially different from that previously adjudicated (**distinguishing**).<sup>[57]</sup>

Between eighteenth and nineteenth century, some

endeavors were undertaken to attend to a codification of common law. One of the first individuals that actively promoted the necessity of such an enterprise was **Jeremy Bentham** (1748-1832) (see *supra*, ch 5, para 3), moved by his dissatisfaction with the then present state of common law.<sup>[58]</sup>

After hearing Blackstone's lectures at the age of only sixteen, Bentham was disgusted by the former's proclivity to praise unreservedly the English common law and by his unwillingness to notice any defect in it; this aversion led Bentham to prompt his first published work,<sup>[59]</sup> where he fiercely attacked one part of the Introduction to Blackstone's *Commentaries* (which were drawn from the latter's lectures). In Bentham's view, existing law was not only cumbersome and illogical, but it advanced only the interests of the lawyers, instead of pursuing 'the greatest happiness of the greatest number'. Therefore, he advocated for its replacement with a complete code of laws, which he termed 'pannomion'; each law had to be 'rationalized', ie accompanied by a set of reasons aimed at justifying it in the eyes of its addressees.<sup>[60]</sup>

If Bentham's efforts failed in the UK, they eventually bore fruit in the US,<sup>[61]</sup> where a wide and long-lasting movement for codification was

tirelessly promoted by David Dudley Field (1805-1894). Thanks to his engagement, a **code of civil procedure of the state of New York** was enacted in 1848-1849 (also known as Field Code) (see also *supra*, ch 4, para 4), which is nowadays adopted by some thirty States of America; [62] it was followed by a **code of criminal procedure of the state of New York**, enacted in 1850 and nowadays adopted in sixteen States, [63] as well as by a **code of penal law**. On the contrary, Field's resoluteness to codifying substantive private law was less successful: although his civil code was passed in 1879, the bar of the City of New York successfully instigated the governor of the state to veto it. [64] Subsequently, five States, including California, adopted their **civil codes on the basis of Field's blueprint**; [65] they are still in force, but they are looked upon just as a revised and improved compilation and systematization of common law rules and principles, far from attaining the degree of completeness and consistency that are a staple of civil law codifications. [66]

The main opponent to Field's ideas was James C. Carter (1827-1905), whose paper 'The Proposed Codification of Our Common Law' has been defined as 'perhaps an American analogue to Savigny's *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*', [67] because it decidedly gainsays the advantages of codification. This paper was read on 13 December 1883 at a meeting of the

Committee of the Association of the Bar of the City of New York and unanimously approved; [68] it was thus put an end to any hope that Field's civil code could finally enter into force.

Traditionally, statutes have been seen as 'either declaratory of common law, or remedial of some defects therein'. [69] However, this account of the sources of English common law has been facing increasing challenges from the growing number of statutes after World War II, as well as by the binding force of the sources of the EU's law (see also *supra*, ch 4, para 2). It means that statutes are now acknowledged as the primary source of English law, [70] and a similar approach applies even more strongly to US law. [71]

With regard to the US, particularly, it must be pointed out that the Constitution confers to the Congress the power to enact statutes of private law solely for certain limited purposes, like regulating interstate commerce. Although during the twentieth century the relevant clauses of the Constitution have been interpreted more and more broadly, it holds still good that private law as such falls out of the scope of **federal statutes**, being instead stipulated by each American State. Federal statutes are collected in the US Code and those of each State in similar **codes**, which, however, have little to do with civil law codifications: for the most part, they are merely convenient, sometimes unofficial, groupings of

<sup>209</sup> legislation according to subject matter.<sup>[72]</sup>

Therefore, private law of each American state may be considerably different from that of another.

The most effective attempt to attain a certain degree of uniformity between them was achieved through the **Uniform Commercial Code (UCC)** of 1952 (see *supra*, ch 3, para 5).

In Anglo-American jurisdictions, the rules governing **interpretation of statutes** have significantly evolved over time.<sup>[73]</sup>

The starting point is that, being considered a kind of exception to or amendment of common law precedents,<sup>[74]</sup> statutes have been traditionally interpreted in their ‘plain, literal, ordinary meaning’.<sup>[75]</sup> No heed has been traditionally paid to the Parliamentary debates or to the purpose of the legislator (**no historical interpretation**).<sup>[76]</sup>

Since the nineteenth century, however, this ‘shallow’ hermeneutical methodology has been significantly broadened and enriched,<sup>[77]</sup> in the sense that courts have shown a growing willingness to interpret statutes beyond the words of their provisions.<sup>[78]</sup> This trajectory marks a progressive convergence of the interpretation of statutes in common law and civil law jurisdictions.<sup>[79]</sup>

The **literal rule**, which is still paramount,<sup>[80]</sup> stipulates that: ‘1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also

determine the extent of general words with reference to the context. 2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning they are capable of bearing'.

The literal rule has been over time supplemented by the mischief rule and the so-called golden rule.

Using the **mischief rule**, the interpreter can assess a statutory provision on the basis of the ‘mischief’ or ‘defect’ it intended to cure within the pre-existing common law. [81] The historical

<sup>210</sup> development of this hermeneutical rule showed a (limited) willingness on the part of the courts to take the purpose of the legislator into consideration. [82]

The so-called **golden rule** enables the interpreter to depart from the literal meaning of the provisions, but only provided their wording is unclear (otherwise, ‘you must follow them, [83] even though they lead to a manifest absurdity.

The Court has nothing to do with the question of whether the legislature has committed an absurdity’). [84]

In principle, statutes must comply with the **Constitution**, which is said to be the highest source of domestic law.

The **English Constitution** is not written but draws on sources of different nature, namely

(constitutional) statutes, common law, and parliamentary conventions.

[85] The latter can be defined as understandings and practice that regulate the conduct of the sovereign power of the state but are not enforced directly by courts.<sup>[86]</sup> Some scholarly publications are recognized as works of authority, the most prominent among them being the *Introduction to the Study of the Law of the Constitution* by Albert Venn Dicey (1835-1922) (see *supra*, ch 7, para 1).

By contrast, the **Constitution of the United States** is enshrined in a written document (1789), which followed the Declaration of Independence (1776). It consists of only seven articles, which, albeit preserved untouched over time, have been supplemented by twenty-seven amendments. It co-exists with the constitutions of the different states, [87] being the US a federal system.

However, a major distinction can be drawn between jurisdictions of common law as to their attitude towards statutes that do not comply with the Constitution.

In the UK, unlike many European countries, no constitutional court is settled,<sup>[88]</sup> nor courts explicitly do have the power to strike down any statute as unconstitutional,<sup>[89]</sup> even after the

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<sup>211</sup> Human Rights Act 1998 came into force.<sup>[90]</sup> This

conclusion draws on the doctrine of parliamentary sovereignty, which traditionally commands an absolute abidance in England: along the words of Dicey, '[t]here is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament'.<sup>[91]</sup>

By contrast, the principle of judicial review of primary legislation contravening the constitution has been established in the US since the case *Marbury v Madison* of 1803,<sup>[92]</sup> whereby this power was acknowledged to the US Supreme Court.<sup>[93]</sup>

In the hierarchy of sources of law of Anglo-American jurisdictions, **administrative regulations** are ranked lower than statutes.

In the US, federal agencies are often conferred through a statute enacted by the Congress the power to issue administrative regulations with rulemaking authority, thus amounting to sources of law.<sup>[94]</sup> These regulations are published in the Federal Register and codified into the Code of Federal Regulations.

In Anglo-American jurisdictions, like in civil law countries (see *supra*, ch 7, para 3.1), **custom** (or **usage**) is acknowledged to be a source of law of last resort (see also *supra*, ch 2, para 2), provided that it is reasonable, certain, and considered by those involved as binding.<sup>[95]</sup> It has relatively little importance in the US,<sup>[96]</sup> more in the UK.

English law distinguishes between customs existing from time

immemorial (ie since 3 September 1189) and those of more recent date. The former have equal authority to common law, whilst the latter do not prevail over it. [97]

## 4. Legal education and legal scholarship

Along the tenets of legal positivism (see *supra*, ch 5), legal scholarship cannot be classified as a source of law. However, it has been convincingly contended that: 'The positivist view that law is created and enforced by the state creates a dangerous optical illusion. The organs of the state may choose, consciously or unconsciously, to enforce rules created elsewhere, for example, the rules found in scholarly writing, in manuals, and in teaching in the universities. The positivist view leads one to neglect these sources.'<sup>98</sup> It must therefore be acknowledged that legal scholarship is a formant of law (see *supra*, ch 3, para 3.2).

<sup>212</sup> Since the medieval renaissance of Roman law (see *supra*, ch 2, para 3), the role played by legal scholars proved to be of the utmost importance for the application and the development of civil law (see *supra*, ch 2, para 4.1). In the civilian tradition, scholars have been resorted to by sovereigns, courts, and private parties to apprehend the right interpretation of the books containing the law (from the Justinian compilation to national codifications). No less importantly, legal scholars were teachers of law at universities, where they not only transmitted knowledge and information but molded in depth their students' mentality.

Still nowadays in civil law jurisdictions, university

professors of law often practice as barristers or serve on the panel of courts; their treatises and commentaries may be extremely influential on practice and thus provide a reliable guidance for the interpretation of national laws.

By contrast, until recent times legal scholarship has been much less influential in common law

jurisdictions,<sup>[99]</sup> particularly in that of England.  
<sup>[100]</sup>

One of the reasons for this fact is that it was only towards the mid-eighteenth century that English law began to be studied in a systematic way and taught at universities (see *supra*, ch 2, para 4.2). Indeed, for several centuries legal education was not provided by English universities, nor was common law taught by their professors. In fact, English barristers were trained at the Inns of

Court, and solicitors at the Inns of Chancery.<sup>[101]</sup>

The four Inns of Court based in London are Lincoln's, Inner Temple, Middle Temple, and Grey's, and they still play a significant (although minor) role in the education of future English barristers.

Since 1903, solicitors have been trained at the Law Society of England and Wales.

However, nine books of antiquity are considered binding, one of them being Blackstone's *Commentaries* (1765-1769) (see *supra*, ch 2, para 5;

ch 4, para 5).<sup>[102]</sup>

In the US, legal scholarship is deemed to play a greater role than in England, probably due to the need of overcoming the parochialism of each state's private law and of rationalizing it.<sup>[103]</sup>

As a matter of fact, the outset of American law was decidedly forged by the grand treatises of some nineteenth-century lawyers, like the *Commentaries on American Law* by James Kent (1763-1847) and the *Commentaries on the Constitution of the United States* by Joseph Story (1779-1845) (see *supra* <sup>213</sup>, ch 3, para 4).<sup>[104]</sup>

Nonetheless, professional schools of law were settled outside universities at least until 1817, when Harvard Law School was founded.

It was Christopher Columbus Langdell (1826-1906) who paved the way for modern legal education in the US. When appointed in the 1870s at Harvard Law School (after becoming its dean until 1895, when he resigned), Langdell was the first of a new generation of professors of law who believed, firstly, that law was not practice (which professors did not undertake or only minimally) but 'a science'; and, secondly, 'that all the available materials of that science are contained in printed books'.<sup>[105]</sup>

Langdell claimed that American law was a complete and coherent conceptual system, endowed with an inner logic and capable of

generating the right answer to any practical problem through deductive syllogism ( classicism ).<sup>[106]</sup> Since Langdell was a pragmatist, however, his claim was based on a methodology of discussion of cases, which he first adopted in teaching.<sup>[107]</sup> Furthermore, he invented 'casebooks' as a genre of legal literature.<sup>[108]</sup>

Although in a different vein, a recent resurgence of formalism has been identified in the textualism (or originalism) advocated for and applied by **Antonin Scalia** (1936-2016) as a member of the Supreme Court of the US.

'Of all the criticisms levelled against textualism, the most mindless is that it is "formalistic". The answer to that is, *of course it's formalistic!* The rule of law is *about* form. [...] Long live formalism. It is what makes a government of laws and not of men'.

[109]

According to **textualism (or originalism)**, the Constitution is to be interpreted in accord with its original meaning, and statutes are to be read in accord with their plain meaning.

According to Justice Scalia,<sup>[110]</sup> one should agree with Holmes's remark which reads: 'We do not inquire what the legislature meant; we ask only what the statute means'.<sup>[111]</sup>

Justice Scalia conceded that, contrary to the doctrine of strict constructionism, 'a text should

not be construed strictly, and it should not be  
<sup>214</sup> construed leniently; it should be construed reasonably, to contain all that it fairly means'. [112]  
He could not, however, resist to add: 'Though better that [ie being a strict constructionist], I suppose, than a nontextualist'. [113]

In the first decades of the twentieth century, American culture was affected by a valuable current of **legal realism**, which, however, never carved out a unitary doctrine nor established one school of thought; rather, it remained a scattered assortment of different views on law and varying trains of thought, advocated for by scholars that had different ideas, styles, and temperaments. [114]

A first relevant stream of this cultural environment may be identified in the so-called **sociological jurisprudence**.

It was **Roscoe Pound** (1870-1964) the first to claim that the 'law in books', as purported by the classicism of Langdell and his followers, had to be replaced with a 'law in action'. [115]

A radical change of paradigm was advocated for, since law was no longer to be conceptualized as an autonomous order of logical concepts but as 'social control through the systematic application of the force of politically organized society'. [116]  
In this vein, the method of finding the law was sought in a strong interaction with other social sciences.

After World War I, the ‘realistic credo’ was embraced by a group of irreverent and iconoclastic scholars, who imposed the notion as a strand of the debate on the nature and the goals of law.

The birth of the movement was announced by its recognized chief, namely Karl N. Llewellyn (1893-1962), with an article published in 1930, [117] which also read as an attack on Dean Roscoe Pound of Harvard Law School. [118] The latter replied, [119] thus engendering a further reaction by Llewellyn. [120]

Legal realists were committed to challenging scholars and courts to behave responsibly, by abandoning any mechanical solutions attributable to a conservative formalism and resorting instead to the methods of empirical social sciences.

Particularly, they intended to challenge courts not only to achieve justice but also to advance public policy, as courts had traditionally done before the American Civil War.

The polemic attitude of legal realists was also flavored by the fact that, being centered in the law faculties of Columbia and Yale Law Schools, they were pitted against Harvard Law School, which had been the realm of Langdell.

Furthermore, despite what he had advocated in the first period of his activity, Pound was by far

<sup>215</sup>

considered an over-arching conservative, while the new realists were all committed to political progressivism.

The representatives of American legal realism acknowledge as their forerunner **Oliver Wendell Holmes, Jr.** (1841-1955), [121] whom they considered as the (first) ‘completely adult jurist’. [122]

Holmes was Justice of the Supreme Court of the United States. His successor, **Benjamin N. Cardozo** (1870-1938), drew on his teachings and is considered one of the main followers of legal realism.

The basic assumption shared by legal realists is that: ‘The life of the law has not been logic: it has been experience’. [123] Accordingly, the claim of classic legal thought, namely to derive law from a conceptual order, implies an omniscient and overall knowledge of things; thus, it was derided as childish or pretentious.

Instead, legal realists claimed that judicial decisions were largely based on ‘hunches’, relying on an intuitive sense of what is right or wrong, an understanding that thus attributed a major role to a judge’s personality and experience. Some of these authors stressed the systemic and social determinants of such ‘biases’ and ‘prejudices’.

Secondly, legal realists advocated for the ‘bad-man theory of law’, based on the assumption

that such a man 'does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts

are likely to do in fact'.<sup>[124]</sup> Therefore, 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law'.<sup>[125]</sup>

Thirdly, although anti-formalist, legal realists considered legal terminology as a key-question, thus viewing as essential the task of fixing properly the meaning of the words used in legal discourse.

Wesley Newcomb Hohfeld (1879-1918) authored a seminal essay on the taxonomy of rights and duties, where he defined the relevant terminology

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<sup>216</sup> (see *infra*, ch 10, para 1).<sup>[126]</sup>

## 5. Law and economics (and other interdisciplinary legal studies)

The developments of the American twentieth century legal culture have been qualified as 'postmodern', having abandoned the search for foundational truths based either on transcendent values or on the myth of the neutrality of the law. These modern movements have instead turned to a multiplicity of interpretative methods aimed at 'unmasking' the great theoretical or axiological narratives of the law, unveiling the stereotypes and social prejudices that used to dwell beneath them. Five major cultural movements have been

subsequently identified:<sup>[127]</sup> law and economics,  
critical legal studies,<sup>[128]</sup> feminist legal theory,  
<sup>[129]</sup> law and literature, and critical race theory.

There is no doubt that a major diffusion and success, not only in the US but also in Europe, has been achieved by the law and economics movement, which is characterized by subjecting the law to an analysis based on economic

methods,<sup>[130]</sup> in particular those of microeconomics and of institutional economics .

In what is known as its normative version, this analysis is ultimately aimed at suggesting modifications to current legislation or to established jurisprudence.

The expression 'law and economics'

was coined in 1925 by the economist John R. Commons (1862-1945).

At its early stage of development, the law and economics movement dealt exclusively with competition law, and in particular antitrust law . It was only later on (since the 1960s) that it spread to other areas of private (and even public) law, moving forward to encompass patrimonial sectors such as contracts, tort liability, and company law, but finally also reaching topics such as personal liberties and family law. This cultural trend of the law and economics movement, referred to as the **economic analysis of law** (EAL), developed at the University of Chicago. A fundamental premise for its development was represented by the acclaimed essay written by **Ronald Coase**(1910-2013) and published under the title of 'The Problem of Social Cost' in 1960.

[<sup>131</sup>]

After having taught a course on the organization and financing of the UK radio industry at the London School of Economics, Coase, who was English, moved to the US (University of Virginia) in 1951. In 1959, he published an article on legal and economic problems associated with the allocation of legal entitlements for radio frequencies in the Journal of Law and Economics. As this article prompted a vivid debate among the economists at Stanford, Coase was invited to

clarify his theses. To this end, he wrote and published 'The Problem of Social Cost': the article that became one of his most famous works.

Discussing the questions posed by industrial pollution and its harmful effects on third parties (**negative externalities**), Coase surmised that, if rights over resources are clearly specified and transferable and individuals have all the information necessary to reach an agreement without wasting time or incurring significant expenses , they are always in the position, through negotiations, to achieve a Pareto-efficient allocation of resources, regardless of their original distribution. Subsequently, the basic idea supporting this argument was formalized as the '**Coase theorem**', which has been re-elaborated in many variations.

As Coase himself stated, the central core of his thesis departed from the insights of an article published by Leo Herzel in 1951 in the University of Chicago Law Review.<sup>[132]</sup>

As for the social role of law, the Coase theorem implies some consequences of great significance. Firstly, it implies that, where its hypothetical condition is satisfied (ie that **transaction costs** are zero or irrelevant), the law would have a neutral effect with respect to the achievement of Pareto-efficiency. As an example, regardless of the

illicit pollution activity of a company, the latter could always continue to carry out its business activity after having reached an agreement with the injured parties, compensating their losses by paying damages.

It must nonetheless be observed that Coase himself considered the assumption of the absence of transaction costs as a 'very unrealistic' one. Using his words, 'in order to carry out a market transaction, it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiation leading up to a bargain , to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on'.

From this, it follows that the law is not irrelevant from the point of view of the achievement of a Pareto-optimum, because the original allocation of a right can imply a significant social cost, given the inability of private parties to negotiate 'in the shadow of the law'. As a corollary, a specific task of the economic analysis of law is that of assessing the social costs of legal rules or of the solutions given to individual cases by judges (**descriptive law and economics**).

Hence, it can further be deduced that the task of the law is precisely that of lowering and possibly eliminating transaction costs, thus allowing

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<sup>218</sup> private individuals to negotiate efficiently, allocating resources to those who value them the

most. To this end, the economic analysis of the law proposes to indicate to a legislator or to a judge how the law should be reformed or interpreted in order to achieve efficient results (**normative law and economics**).

From a policy point of view, the Coase theorem suggests that, under certain conditions, private negotiations would be preferable to public law interventions (eg higher taxation of polluting industrial activities) as a legal device for the regulation of the market. More generally, this theory is underpinned by a liberal approach to the economy and, consequently, by a rather radical liberalism both in politics and in legal theory. This approach has a relevant corollary in legal theory: Coase's analysis paved the way for a markedly anti-positivistic attitude, a perspective shared by **Richard Posner** and all the scholars that, at the University of Chicago, subsequently carried out law and economics studies.

After the publication of 'The Problem of Social Cost', Coase was appointed in 1964 by the University of Chicago as Professor of Law and Economics, and later as Director of the Journal of Law and Economics. As early as the 1950s, the same university, although not the faculty of economics, hosted **Friedrich von Hayek** (1899-1992), another leading actor in European liberalism. Thanks to the intervention of Aaron Director, the University of Chicago

Press had published von Hayek's *The Road to Serfdom* (1944), which can be considered one of the manifestos of liberalism. Although not formally associated with the law and economics movement, he crucially contributed to the development of its more general liberal approach. Other members of the University of Chicago (such as Frank Knight and George Stigler) co-operated with von Hayek in the Mont Pelerin Society, an international classical liberal organization (see *supra*, ch 7, para 1).

A different strand of the law and economics movement originated in the research and teaching of **Guido Calabresi** and still has its center at Yale University. In 1961, in parallel with the work of Coase, Calabresi published the essay 'Some Thoughts on Risk Distribution and the Law of Torts', [133] which, together with his subsequent book *The Costs of Accidents* (1970), [134] represents a cornerstone of law and economics literature. On the same topic, again in 1961, Pietro Trimarchi published another important monographic work in Italy, entitled *Rischio e responsabilità oggettiva*.

While the Chicago school focuses on allocative efficiency and is characterized by a clearly liberalist ideological orientation, the approach that evolved at Yale also considers the **distributional efficiency** of legal rules, and it is more sensitive to democratic and reformist

issues.

This renewed approach is perfectly illustrated by an important revision proposed by Calabresi to the efficiency definition elaborated by Pareto,

<sup>219</sup> originally illustrated in an unreleased part of Calabresi's article 'Some Thoughts on Risk Distribution and the Law of Torts', [135] a text that was formally published only in 1991. [136]

Contrary to what Coase had suggested, Calabresi observed that it is not always the case that those who suffer from the negative effects of someone else's activity can enforce their rights, forcing the externality to stop. This is possible only when the entitlement is protected by the legal system through a '**property rule**'. Conversely, when the entitlement is protected via a mere '**liability rule**', the right-holders can file claim solely for financial compensation of the damages they suffer. [137]

In terms of policy options, Calabresi has thus shown that the **Pareto criterion**, adopted by Coase when comparing the *status quo* with a merely hypothetical change, can end up favoring conservatism.

The Pareto criterion states that, for society, moving from Status A to Status B is efficient if, after the change, no one is worse off and at least one individual is better off. In other words, Social Situation B is preferable to Social Situation A only if no one prefers A over B and at least one member of society prefers

B over A. According to this criterion, therefore, social or legal reform is justified only on the basis of unanimous consensus.

At the same time, the **Kaldor-Hicks criterion**, which allows the situation of one individual to be worsened simply based on an abstract possibility of compensation, unambiguously results in optimal outcomes only if transaction costs are always irrelevant, because only under such an assumption would compensation actually be paid. However, since these costs are often positive, the afore-mentioned criterion demonstrates the risk of ensuring that those who are advantaged become even richer, while those who are disadvantaged become increasingly poorer. The problem of distributive justice becomes thus crucial.

The Kaldor-Hicks criterion states that, for society, moving from Status A to Status B is efficient only if, after the change, those who are better off are in the position to fully compensate those who are worse off. Compared to the Pareto criterion, the Kaldor-Hicks criterion is based on a purely hypothetical assessment, as it does not presuppose that the compensation is later actually paid to those who have been disadvantaged.

Moreover, Calabresi's teaching is based on the

assumption that the law is not wholly linked to the economy and that therefore economic criteria cannot always be a reason to criticize or modify the law.

<sup>220</sup> ‘In this sense, while in Economic Analysis of Law economics dominates and law is its subject of analysis and criticism, in Law and Economics the relationship is bilateral. Economic theory examines law, but not infrequently this examination leads to changes in economic theory rather than to changes in law or in the way legal reality is described’ [138]

A further strand of the law and economics movement is linked to the developments of **institutional economics**, which have found their academic seat especially at Michigan State University. Also in this case, a crucial role has been played by another path-breaking article written by Coase, ‘The Nature of the Firm’ (1937), [139] which compared the costs of an enterprise as a hierarchical organization with those of horizontal relationships based on market negotiations.

This approach was subsequently taken up and decisively developed by **Oliver Williamson**, who pointed out that within the extreme poles of a vertically integrated firm, on one hand, and autonomous market transactions, on the other, there lies a discrete series of hybrid forms of

organization (eg franchising networks, long-term contracts, supply and distribution chains).

Williamson's theory has helped to extend the analysis of governance theory, originally applied only to corporate structures but more recently developed also with regard to complex contractual relationships.<sup>[140]</sup>

This method of investigation has been profitably applied in particular to the analysis of **relational contracts**, which, according to a study carried out by Ian R. Macneil (1929-2010), are characterized by a condition of reciprocal dependence that links the contractual parties. This dependence develops over time and requires continuous adjustments and renegotiation within the 'frame of reference' traced by the terms of the original agreement.

### Glossary

### Biographies

## CHAPTER 8

### European law

- The European Union and its law
- The sources of European Union law
- The supremacy (or primacy) of the European Union law over national laws
- State liability for infringement of European Union law
- European private law in force (*acquis communautaire*)
- The European common core of national private laws (*acquis commune*)
- European restatements and model laws regarding contracts and other areas of private law
- The projects calling for a European codification of private law

The cataclysmic experience of two world wars induced European countries to promote the achievement of a kind of supranational unity, aimed at the promotion of peace among them. Thus, in 1957-1958, six European countries signed the Treaty of Rome, creating the European Economic Community (EEC), which was later accompanied by and eventually absorbed into the European Union (EU).

The aim of establishing and running a single market of the EU is pursued through a European law that is instrumental to an economic constitution based upon a system decision in favor of a 'social market economy' EU law not only operates at the level of international relations between the Member States, but also confers individual rights and liberties on citizens and ensures that they are entitled to petition both domestic and European courts for the enforcement of such

legal positions.

The sources of EU primary law are the founding Treaties, in which the Charter of Fundamental Rights of the European Union, as well as the general principles derived from the European Convention on Human Rights have been embedded. Furthermore, the European Court of Justice resorted to some 'general principles of civil law', which would represent part of the rules 'common to the legal systems of the Member States'.<sup>234</sup> The sources of EU secondary law are the regulations and the directives. The overall body of the principles and rules they provide is called *acquis communautaire*.

The principle of the EU law's supremacy over national law has been progressively elaborated and applied by the ECJ. An implication of this principle may be detected in the rule according to which a private citizen has to be compensated in case of damage caused by the infringement of the law by a Member State.

EU private law is based on a vertical approach and has been mostly enacted by means of directives, which, pursuant to article 288 TFEU, are 'binding as to the result to be achieved', but 'shall leave to the national authorities the choice of form and methods', EU law and national laws are, therefore, to coexist and to interact in a multi-levelled system.

This is all the more true if one considers that the directives initially enacted are aimed at a 'minimum harmonization' of the Member States' private law, whereas only those subsequently issued pursue a 'maximum harmonization' of it. At the primary level, EU private law covers the fundamental economic freedoms (including the prohibition of discrimination) and competition law (above all, antitrust law).

At the secondary level, the EU has regulated

labor (or employment) law, company law, intellectual and industrial property law. From the mid-1980s onwards, an EU contract law has been growing as well, mostly directed at business-to-consumer transactions. It consists of a general part (whose rules apply to any type of contract) and of a special part (whose rules apply solely to single types of contracts). In recent decades, the idea emerged that national laws share a 'common core' that can be depicted as European (so-called *acquis commune*). This 'common core' is presented as rooted in the legacy of Roman law and its historical development during the Middle Ages; a European 'law beyond the state' has also surfaced in merchants' practices and standard contracts of international trade (*lex mercatoria*). This understanding led some groups of scholars to draft collections of model rules, which proved influential on national and EU legislatures; they can also be elected by the contracting parties as the substantive law to be applied to their contract, at least by arbitration tribunals.

Despite the efforts of the European institutions, attempts to merge the *acquis communautaire* and the *acquis commune* into a European civil code have failed thus far.

<sup>233</sup> 1. European Union law (*acquis communautaire*)

1.1. History and concept

The cataclysmic experience of two world wars

unleashed by European countries in the first half of the twentieth century led some of the latter to seek to mitigate the economic and political nationalism that had previously characterized their states. They thus promoted the idea of a supranational unity, aimed at achieving peace and freedom for their citizens.

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Through the Paris Treaty of 1951-1952, six European countries ('the inner Six') came to set up the **European Coal and Steel Community** (ECSC) in order to create a supranational control over the areas of production of these raw materials, located between France and Germany.

The main proponents of the initiative were Jean Monnet (1888-1979) and Robert Schuman (1886-1963).

The areas of production of coal and steel that had caused bloody conflicts between France and Germany were the Ruhr, the Alsace, and the Lorraine.

Whereas endeavors to establish similar entities with political and defense tasks failed, the aim of economic cooperation was further pursued, particularly after the Messina Conference of 1955. In 1957, the 'inner Six' came to sign the Treaties of Rome, thus creating the **European Economic Community** (EEC), as well as the **European Atomic Energy Community** (EURATOM).<sup>[1]</sup>

The 'inner Six' were Belgium,

France, Italy, Luxembourg, the Netherlands, and Germany.

Seven countries that were unable or unwilling to become Member States of the EEC ('the outer Seven'), namely Austria, Denmark, Norway, Portugal, Sweden, Switzerland, the UK, established the European Free Trade Association (EFTA in 1960) . Most of these countries, however, subsequently joined the EEC (or its further evolutions) and, therefore, left the EFTA. Current members of the latter are Iceland, Liechtenstein, Norway, and Switzerland.

The EEC was established with the main purpose of creating a **European common market** (ECM) among the Member States, which could provide not merely a customs union but a free trade area. From its outset, the EEC was endowed with legal personality and with some **sovereign powers** , held by its own institutions (above all, the Council and the Commission for the legislature and the executive, and the Court of Justice for the judiciary; to a much lesser extent, the Assembly, which initially was purported solely to monitor the Commission).

The first major revision of the Treaty of Rome was accomplished through the Single European Act of 1986-1987, after which the fundamental aim of the EEC was shifted from the establishment and functioning of a common market to those of a single (or internal) **market** , i.e. a trade bloc

characterized by a fully-fledged freedom of movement of capital and persons as well as of goods and services. Importantly, this also provided that the adoption of legislative measures pursuing that aim was no longer based on unanimity within the Council but on a qualified majority.

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Through the **Maastricht Treaty** of 1992-1993, the competences entrusted to the EEC were extended to sectors of social and political importance,<sup>[2]</sup> so that it was no longer referred to as 'economic' and became the **European Community** (EC). At the same time, the latter became the bulk of a new entity, the **European Union** (EU), which was characterized by a 'three-pillar structure', because it entailed, beside the EC itself, two forms of intergovernmental cooperation, namely in the fields of foreign and security policy, and of criminal justice.<sup>[3]</sup>

The second and third pillars were officially termed, respectively, the Common Foreign and Security Policy (CFSP) and the Police and Judicial Cooperation in Criminal Matters (PJCC), which was initially known as Justice and Home Affairs (JHA).

Moreover, the Treaty of Maastricht created an Economic and Monetary Union (EMU), whose currency is the euro, as well as Union citizenship.<sup>[4]</sup> Through the establishment of the

'procedure of co-decision', the European Parliament finally gained some effective power in law-making, shared with the Council upon initiative of the Commission.<sup>[5]</sup>

Subsequently, through the Treaty of Amsterdam from 1997, most of the topics covered by the second and third pillars of the EU were shifted from the 'intergovernmental method' to the 'community method';

<sup>[6]</sup>the focus on fundamental rights protection and social policy was considerably strengthened.<sup>[7]</sup> The legislative procedure of co-decision was simplified, and its scope broadened.<sup>[8]</sup>

The Treaty of Nice from 2001 largely revised the composition and functioning of the European institutions, in preparation for the forthcoming enlargement of the Union to the countries of Eastern Europe. The legislative procedure of co-decision was extended to further topics.<sup>[9]</sup>

Through the Treaty of Lisbon of 2007-2009, the two still existing European Communities (namely the EC and the EURATOM) were absorbed into the EU.<sup>[10]</sup> The three pillars that had characterized the structure of the latter were abolished, and the community method was extended to all its competences. The legislative

'procedure of co-decision' eventually became the 'ordinary legislative procedure'.

The number of Member States has gradually grown over time, up to the level of 28 until end of January 2020. The new accessions to the EEC/EC/EU occurred in stages, known as 'enlargements' (or 'European integration'). First to step in(after an initial veto from France) was the UK (together with some countries whose economies are linked to it, like Ireland); secondly, the Mediterranean countries that had not yet applied; thirdly, those of Eastern Europe.

Historical enlargements of the EEC/EC/EU were as follows:

1973: UK, Ireland, Denmark;  
1981: Greece;  
1986: Spain and Portugal;  
1995: Austria, Sweden, Finland;  
2004: Cyprus, Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Slovenia, Hungary;  
2007: Bulgaria, Romania;  
2013: Croatia.

Following a referendum held on 23 June 2016,<sup>[11]</sup> however, the UK initiated in 2017 the procedure set out in article 50 TEU to exit the EU (' Brexit

).<sup>[12]</sup> The date of this departure had to be repeatedly postponed by the UK,<sup>[13]</sup> due to long negotiations with the EU and also to a deep turmoil between the UK Parliament and the government. While the UK Parliament had

refused to approve a first withdrawal agreement between the UK and the EU in December 2018, an amended withdrawal agreement between the UK and the EU was eventually signed on 24 January 2020.<sup>[14]</sup> The UK therefore ceased to be a Member State of the EU on 31 January 2020 at 11 PM GMT, and the withdrawal agreement with the EU thus came into force.

Since its foundation, the EEC has developed and depicted itself as ‘a Community based on the rule of law’.<sup>[15]</sup> The path of promoting the economic and social integration between Member States is pursued through law (**integration through law**).

Although the EU is an organization of international law, created through the traditional instrument of the interstate agreement, it has peculiar characteristics. According to the formula coined by the German Constitutional Court (*Bundesverfassungsgericht*) in the so-called Maastricht ruling of 1993,<sup>[16]</sup> the EU, on the one hand, has sovereign rights and therefore is not a pure confederation of states, but on the other hand, is not founded on a unified constitutional state population and thus cannot be considered as a federal state.

In matters that are attributed to its competence, the EU exercises both legislative power (through the Parliament,<sup>[17]</sup> the Commission,<sup>[18]</sup> the Council and the European Council),<sup>[19]</sup> and judiciary power (through the Court of Justice).<sup>[20]</sup>

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It follows that, by implying a renunciation of national sovereignty, the accession of a Member State to the EU at times required an *ad hoc* constitutional justification, which has been sometimes adopted through a specific revision of the respective fundamental charter and/or through a referendum.

In Germany, for example, article 23 GG was rewritten and transformed into a veritable *Europa-Klausel*.

On becoming a member of the EU, the UK Parliament enacted the European Communities Act 1972,<sup>[21]</sup> which made provision in particular for the incorporation of EU law into UK law and also for the interpretation of both directly applicable EU law and relevant UK law in accordance with the principles laid down by the European Court.<sup>[22]</sup> While the 1972 Act was repealed on the UK's leaving the EU (on 'exit day', as eventually set at 31 January 2020),<sup>[23]</sup> most of its effect was 'saved' by the European Union (Withdrawal Agreement) Act 2020 so as to give effect to the transitional provisions in the UK's agreement with the EU for a period termed the 'implementation period'.<sup>[24]</sup> For most purposes, therefore, while the UK left the EU on 31 January 2020, EU law will still apply in the UK until 31 December 2020 (termed by the legislation 'IP completion day').

Moreover, even after the end of the ‘implementation period’, most EU-law as already existing is to be retained as part of UK law. This includes: (1) EU-derived domestic law, so far as in force immediately before IP completion day;<sup>[25]</sup> (2) direct EU legislation, so far as operative immediately before IP completion day;<sup>[26]</sup> and (3) any rights, powers, liabilities, obligations, restrictions, remedies, and procedures, which, immediately before IP completion day, were created or arose by or under the EU Treaties;<sup>[27]</sup> if they arose under an EU directive (not implemented in the UK’s law), however, they are to be retained only if they are ‘of a kind recognised by the ECJ or any court or tribunal in the UK in a case decided before exit day’.<sup>[28]</sup>

When interpreting such ‘retained EU law’, UK courts and tribunals (bar the Supreme Court)<sup>[29]</sup> are bound by any retained case law and any retained general principles laid down by the European Court before IP completion day;<sup>[30]</sup> furthermore, they must have regard for the limits of EU competence existing immediately before the completion day of the ‘implementation period’.<sup>[31]</sup> By contrast, while UK courts may have regard to anything done by the ECJ, another EU entity, or the EU on or after IP completion day,

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they are under no obligation to do so.<sup>[32]</sup>

The status of such ‘retained EU law’ is that of UK domestic law,<sup>[33]</sup> and so it can be modified by the UK Parliament;<sup>[34]</sup> it may also be amended by government regulation so as to deal with ‘deficiencies arising from withdrawal’ from the EU.<sup>[35]</sup>

The creation and expansion of EU law was strongly influenced by the doctrine of German ordo-liberalism (*Ordoliberalismus*), which clearly advocated a **society based on private law** (*Privatrechtsgesellschaft*),<sup>[36]</sup> where the constitutional principle of protecting individual freedoms was to be incorporated into strong economic regulation. The foundation of the EU was therefore laid through its **economic constitution** (*Wirtschaftsverfassung*).<sup>[37]</sup>

The EU economic constitution is based on economic freedoms, particularly the right to undertake private initiatives, while also addressing the fact that, if not duly regulated, such freedoms endanger the existence and the functioning of the market itself and, in the long run, compel it to fail (**market failure**). A paramount case is that of cartels between businesses aimed, for example, at imposing certain prices, or at boycotting a competitor. A selected few thus gain the **private power** to act to the detriment of other businesses, and possibly of

consumers as well. Ordo-liberalism urges the holders of the public power to ban and sanction such conduct, [38] and it has taken a fundamental **system decision** (*Systementscheidung*) in favor of a **social market economy**, [39] that is now enshrined in article 3(3)(1) TEU.

Ordo-liberalistic doctrines were historically strong critics of the dictatorial view of society and economy that the *Drittes Reich* led by Adolf Hitler had embraced in Germany.

Nonetheless, after World War II, ordo-liberalism was sometimes accused of promoting a form of authoritarianism, however liberal it may be, [40] or even resembling the form of totalitarianism it was supposed to combat. [41]

Consequently, EU law was first articulated in a *pars destruens*, properly designed to carry out a liberalistic function. It was created by removing from national legal systems those legislative and administrative provisions that constituted potential obstacles to the exercise of economic freedoms guaranteed by the founding Treaties (negative integration).

On the other hand, the *pars costruens* of EU law acts as a re-regulation of the market and society, creating a legislative framework that unifies the legal systems of the Member States (positive integration).

One of the milestones of EU law was the ECJ judgment of the **van Gend en Loos case** (1963),<sup>42</sup> according to which not only do the founding Treaties operate on the level of international relations between the Member States, they also confer individual rights and liberties on citizens and ensure that they are entitled to petition both domestic and European courts for the enforcement of such legal positions .

'The European Economic Community constitutes a new legal order of international Law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their Nationals'.<sup>43</sup>

This turning point in European law must be ascribed to the merit of a great Italian jurist who was then a judge of the ECJ, namely Alberto Trabucchi (1907-1998). He managed to convince the other members of the judging panel to abandon the previous conception of European law, which was merely internationalist.<sup>44</sup>

The overall corpus of EU law has traditionally taken the name of *acquis communautaire* .

In 2011, the European Law Institute (ELI) was established and entrusted with the quest for better law-making in Europe, the enhancement of

European legal integration, and the building up of  
a European legal culture.<sup>45</sup>

## 1.2. The sources of European Union law

The sources of EU law are divided into primary (or original) and secondary sources.

### 1.2.1. At the primary level

EU primary law is not posited by the EU itself, but constitutes its own foundation, laid down by the Member States. Its main sources are the founding Treaties and their subsequent revisions over time.

The **Treaty on the European Union** (TEU) and the **Treaty on the Functioning of the European Union** (TFEU) have been in force since 2009.

They are the final resolution of a gradual revision of the Rome Treaties, along with major substantial and institutional changes reforms (see *above*, ch 8, para 1.1 ).

The founding Treaties have framed the powers and organized the structure of European

institutions,<sup>46</sup> setting out their constitutional basis.<sup>47</sup>

Since the judgment in **van Gend en Loos case** (1963), the ECJ clarified that the founding Treaties are directly applicable not only to Member States but also to their citizens, thus creating rights and obligations for the latter that are likely to be protected both by national and European courts (see *supra*, ch 8, para 1.1 ).

The last version of article 6(1) TEU expressly

embedded the Charter of Fundamental Rights of the European Union (CFR) of 7 December 2000 into the primary law of the EU, binding the latter to recognize the rights, freedoms and principles

<sup>48</sup> set out in the former.<sup>[48]</sup> However, article 6(2) TEU specified that: '[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties'. It means that Member States are not bound by the Charter or forced by the EU to apply it according to the same terms and conditions, except in those areas in which the EU has competence provided by the founding Treaties.

After Brexit comes into full effect on 'IP completion day' (see *supra*, ch 8, para 1.1), the CFR will not form part

<sup>49</sup> of UK domestic law.<sup>[49]</sup> This will not affect, however, the retention of any fundamental rights or principles which existed in UK domestic law

<sup>50</sup> irrespective of the CFR.<sup>[50]</sup>

The primary sources of EU law also include its general principles (see also *supra*, ch 6, para 3).

<sup>51</sup>

At the outset, such principles were drawn by the ECJ from the founding Treaties and were directed at conceptualizing some of the inner characteristics of EC law, like its supremacy (priority) over national laws (see *infra*, ch 8, para 1.3), its effectiveness,<sup>[52]</sup> subsidiarity,

proportionality,<sup>[53]</sup> and certainty;<sup>[54]</sup> in a number of cases the ECJ affirmed as well a prohibition of abuse of EEC/EC/EU law,<sup>[55]</sup> which has gone on to become a general tenet of its jurisprudence.<sup>[56]</sup>

These principles may be depicted as

<sup>243</sup> ‘institutional’,<sup>[57]</sup> since they are rooted in constitutional and – at least partially – administrative law;<sup>[58]</sup> it is therefore consequential that some of them, initially enshrined in the jurisprudence of the ECJ, were subsequently laid down in the founding Treaties.

For example, the principle of subsidiarity was eventually posited by article 5(3) TEU; that of proportionality by article 5(4) TEU.

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A similar development took place with regard to the protection of human (or fundamental)

rights,<sup>[60]</sup> which, although remaining the preservation of the Member States, has been provided for by the ECJ since the 1970s and is based on ‘the constitutional traditions common to the Member States’<sup>[61]</sup>.

Later,<sup>[62]</sup> the jurisprudence of the ECJ on the protection of human (or fundamental) rights was based also on an express reference to international treaties obliging Member States to respect the above-mentioned rights, and in

particular the European Convention on Human Rights (ECHR). The latest version of article 6(3) TEU stipulates that: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

The ECHR, formally the Convention for the Protection of Human Rights and Fundamental Freedoms, was drafted and adopted in 1950 by the Council of Europe (not to be confused with either the Council or the European Council of the EEC/EC/EU)<sup>[63]</sup>. It is applied by the European Court of Human Rights (ECtHR)<sup>[64]</sup>, whose seat is in Luxembourg.

More recently, the ECJ resorted to 'general principles of civil law' (for example, compensation for loss, good faith, and restitution of unjust enrichment),<sup>[65]</sup> in order to fill in the gaps of EU law. Such principles represent part of the rules 'common to the legal systems of the

<sup>244</sup> Member States'.<sup>[66]</sup> Some of the values that traditionally underpin private law have thus been recognized as principles of EU law.<sup>[67]</sup>

### 1.2.2. At the secondary level

Pursuant to article 288(1) TFEU, the secondary sources of EU law are regulations, directives, and decisions. The latter also includes **recommendations and opinions**, which however are not legally binding and, as a result, cannot be considered sources of law.

More specifically, article 288(2) TFEU provides that '**a regulation** shall have general application. It shall be binding in its entirety and directly

applicable in all Member States'.<sup>[68]</sup> EU regulations are applicable generally because they consist of abstract and general provisions,

regulating an unlimited number of cases;<sup>[69]</sup> they are applicable directly because they do not require that Member States adopt any national measure to transpose or implement them, but they take immediate effect in both vertical (between Member States and citizens) and horizontal relationships (between citizens). Due to their direct effect, they achieve a **unification** of the Member States' legal systems.

EU regulations are capable of creating individual rights that national courts must protect (

Leonesio case of 1972).<sup>[70]</sup>

According to article 288(3) TFEU, '**a directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the

choice of form and methods.'

As a result, directives are clearly binding on the Member States; therefore, a national (legislative or regulatory) measure from each Member State is required for their application to citizens, if necessary to determine the forms and methods of achieving the aim pursued by the EU legislator.

Directives are, thus, applied or implemented into

<sup>245</sup> national law through the specific tools provided for by national legislation. They are therefore said to carry out a **harmonization** (or **approximation**) of the Member States' legal system.

The interpretation of this national legislation must be undertaken in harmony with the directive, so that the objective set by European lawmakers can be achieved ( von Colson and Kamann case of 1984).<sup>[71]</sup>

In even broader terms, all national legislative acts, whether adopted before or after a directive, must be constructed in accordance with the directive, having regard to its wording and ultimate purpose

( Marleasing case of 1990).<sup>[72]</sup>

The harmonization of national legislation imposes a strict standard in cases where a state's decision not to implement legislative or administrative measures rests on the discretionary assumption that national legislation is already in line with the

directive (Wagner Miret case of 1993 ).<sup>[73]</sup>

If a directive not implemented by a Member State contains a provision 'which is not subject to any

exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the community or of Member States', then this provision must apply regardless of any incompatible national laws ( **van Duyn case** of 1974).<sup>[74]</sup>

It was later clarified that this is true only in cases where the non-implemented directive requires a State to comply with an obligation that is – not only unconditioned, but also – 'sufficiently precise' ( **Ratti case** of 1979).<sup>[75]</sup>

This solution will help prevent any defaulting States from taking advantage of their violation of the founding Treaties as a basis for resolving disputes with individuals. It follows that the rule of direct applicability of the so-called self-executing directives applies only to the state (vertical relations), even if the latter acts *iureprivaterum* ( **Marshall case** of 1986).<sup>[76]</sup>

To this end, the state is not identified on the basis of the legal nature of the person acting, but on the basis of the public nature of the functions or of the activity it performs ( **Foster case** of 1990).<sup>[77]</sup>

Non-executing directives are not directly applicable to individuals (horizontal relationships), but national laws must be interpreted in accordance with the directive ( **Faccini Dori case** of 1994).<sup>[78]</sup>

If a State fails to implement a directive, or implements a directive inaccurately, that State is in violation of EU law and, consequently, is obliged to pay damages to its citizens who could have benefited from the rights granted by it.

Three conditions, however, must first be met (

<sup>246</sup> **Francovich case** of 1990; see also *infra*, ch 8, para

<sup>79</sup> 1.4):<sup>79</sup> Firstly, the purpose of the directive must be to grant rights to individuals. Secondly, it must be possible to identify the content of the rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the state's obligation and the damage suffered.

### 1.3. The supremacy (priority) of European Union law over the Member States' laws

The competence to interpret and apply EU law lies not only with the judges of the ECJ but above all with the national courts, who can resolve doubts about the interpretation of supranational law by issuing the so-called preliminary ruling, i.e. suspending the judgment and referring the interpretative question to the ECJ (article 267 TFEU). If the doubt about the interpretation of EU law arises in a superior national court 'against whose decisions there is no judicial remedy under national law', then the latter court has not only the opportunity but the duty to refer the case for a preliminary ruling.

It therefore falls primarily to national courts to solve issues related to the relationships between EU law and national law. In this regard, the ECJ has progressively elaborated on and declared the principle of the EU law's supremacy over national law.

After the UK's leaving the EU comes into full effect on 'IP completion day' (see *supra*, ch 8, para 1.1), '[t]he principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after IP completion day' in the UK;

[<sup>80</sup>] on the other hand, that principle 'continues to apply on or after IP completion day so far as relevant to

the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day' in the UK.<sup>[81]</sup>

Before the completion day of the implementation period (see *supra*, ch 8, para 1.1), however, a UK court is bound by principles and decisions made by the ECJ,<sup>[82]</sup> to which it can still refer to a matter.<sup>[83]</sup>

An outspoken declaration of that principle appeared for the first time in the judgment concerning the **Costa v Enel case** (1964), where by the Court of Justice stated that an EU legislative act prevails over a national one even if the second piece of legislation is enacted after the first. Thus, the relationship between the two legal systems cannot be solved using the classic canon *lex posterior derogat priori* (see also ch 6, para 2.3).

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<sup>[84]</sup>

In the subsequent **Simmenthal case** (1978), the ECJ further clarified that the EU law's primacy implies that it must be directly applied by the national judge. The latter does not need to suspend the proceeding in order to refer such a

task to a different authority of the state.<sup>[85]</sup>

In conclusion, the principle of EU law's primacy was affirmed in the seventeenth annexed declaration of the final act of the intergovernmental conference which adopted the

Lisbon Treaty (see *supra*, ch 8, para 1.1). There, it is written as follows: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law'.

This decision, and more generally, the new European Union's institutional framework, were put under the scrutiny of the German Constitutional Court ( *Bundesverfassungsgericht* ), which considered them legitimate according to the German Fundamental law ( *Grundgesetz* ) ( Lissabon Urteil of 2009).<sup>[86]</sup>

## 1.4. State liability for infringement of European Union law

One result of the principle of EU law supremacy is found in the rule according to which a private citizen has to be compensated for damage arising from an infringement of the law by a Member State. In reality, with respect to the application and the observance to EU law, Member States are considered as private entities, because they have accepted limitations to their sovereignty. Ultimately, this solution corresponds to more recent developments in contemporary constitutionalism.<sup>[87]</sup>

A typical hypothesis of such an infringement was envisaged in the absent or incomplete implementation of EU directives by a Member State ( **Francovich case** of 1990; see also *supra*, ch 8, para 1.2). In this case, the Member State who has infringed EU law is obliged to compensate the victim under three conditions: 'The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties'.<sup>[88]</sup>

The ECJ has further clarified that the State is

obliged to pay damages regardless of which government body was responsible, by act or omission, for the violation of European Union law

<sup>248</sup> ( joined cases *Brasserie du Pêcheur* and

<sup>89</sup> *Factortame III* of 1996).<sup>[89]</sup> Moreover, it affirmed that, where a Member State acts in a field where it has a wide discretion, comparable to that of the European institutions, it can incur liability solely for manifestly and gravely disregarding Union law (joined cases *Brasserie du Pêcheur* and

<sup>90</sup> *Factortame III* of 1996).<sup>[90]</sup>

Subsequently, the ECJ declared that the liability of the State also exists when EU law has been infringed by a national judge of last instance (

<sup>91</sup> *Köbler case* of 2003),<sup>[91]</sup> in particular when a manifest breach of the ECJ jurisprudence has been committed.<sup>ninety two</sup> A Member State cannot therefore exclude or limit its liability for damages in cases in which the infringement of EU law arises from an interpretation of the provisions of law made by national judges or from the assessment of the facts and evidence, insofar as these have been made in the context of applying specific provisions relating to the burden of proof or the weight or admissibility of evidence (

<sup>93</sup> *Traghetti del Mediterraneo case* of 2006).<sup>[93]</sup>

## 1.5. Existing private law of the European Union

From the outset, European institutions mainly pursued the approximation of Member States' public law, first of all in the field of taxation.

However, during the grand speech delivered in 1963 at the Max Planck Institute of Hamburg, Walter Hallstein (1901-1982), the first President of the EEC, made clear that the pursuit of the Community's aims, in particular with regard to the establishment and functioning of the common market, necessarily required an extension of the legislative action of European institutions to also encompass private law, particularly in matters of society and employment.<sup>[94]</sup>

As a matter of fact, the number of private law rules posited by the European institutions has increased tremendously over time, thus gaining considerable momentum within the *acquis communautaire*. A turning point was definitely marked by the SEA of 1986-1987 (see *supra*, ch 8, para 1.1), flanked by the *White Paper on the*

*Completion of Internal Market of 1985:*<sup>[95]</sup> the newly envisaged aim of the establishment and functioning of a single (or internal) market called for (not only a negative integration which would serve to merely liberalize the market but also) a positive integration that would implement market regulation (see *supra*, ch 8, para 1.1).

<sup>249</sup> Furthermore, the abandonment of the unanimity

requirement within the Council obviously removed the possibility that the veto of a single Member State could hamper the EEC legislature, as had previously occurred (see *supra*, ch 8, para 1.1).

At least from mid-1980s, therefore, (German) scholarship conceptualized the existence of an EU **private law**, which would entail binding rules of private law with an identical content across the

Member States.<sup>96</sup> This definition may be spurious, particularly as almost all sources of EU private law do not exist in regulations but in directives, which, by definition, do not strive for unification but the approximation of the Member States' laws (see *supra*, ch 8, para 1.2.2). Until the beginning of the 2000s, moreover, the directives that stipulated EU private law were aimed at **minimum harmonization**, to leave the Member States the option to provide for a stricter protection of consumers and, therefore, to maintain (or even to introduce) national differences; it is only in recent years that the EU legislature has turned to a **maximum (or full) harmonization**, which sets out a European level playing field.

Due to the principles of conferral, subsidiarity, and proportionality (see *supra*, ch 8, para 1.2.1), therefore, EU private law traverses solely the single sectors of the common market where the call for regulatory intervention of the EU is more stringent (vertical approach, or piecemeal

approach )<sup>[97]</sup>. In contrast to the national tradition of private law, as a consequence, its scope is more fragmented, and its content is not organized as a complete or consistent system,<sup>[98]</sup> but it proves rather pointillist. EU private law regulations have therefore been depicted as 'islands' in the ocean of national private law.<sup>[99]</sup>

Substantially, EU private law may be depicted as **market law**, since it deals with organizational issues of undertakings (businesses and other professionals) and with the transactions they enter into, either with other undertakings or with consumers. This does mean that EU private law may be understood as commercial law, or business law.

Since EU private law has been enacted over time and is drawn from a significant number of sources, a group of European scholars, called Research Group on the Existing EC Private Law (Acquis Group, for short), envisaged collecting and rationalizing *it*. To date, however, the resulting Principles of the Existing EC Private Law, or **Acquis Principles** (ACQP), have been

<sup>250</sup> solely published with regard to contract law.<sup>[100]</sup>

Pursuant to article 1:101(2) ACQP, they are purported to 'serve as a source for the drafting, the transposition and the interpretation of European Community law'. To achieve this goal, the ACQP strive

not only to provide a systematic analysis of existing EC contract law but also to generalize large parts of it, thus overcoming its inherent fragmentation; moreover, they are accompanied by a critical evaluation of EU legislation, directed at identifying its deficiencies and improve its quality.<sup>[101]</sup>

### 1.5.1. At the primary level

Historically, two key domains of EU private law have been addressed and ruled by the sources of primary EU law, namely (fundamental) economic freedoms and competition.

The (fundamental) economic freedoms enshrined in the TFEU aim to safeguard and enhance:<sup>[102]</sup> 1) the free movement of goods; 2) the free movement of persons (including the free movement of workers and the freedom of establishment); 3) the free movement of services; 4) the free movement of capital and payments.

<sup>[103]</sup> Save for the free movement of goods, the (fundamental) economic freedoms are deemed by the ECJ to be directly applicable not only to protect interests of private citizens against a State (vertical relationships), but also between citizens (horizontal relationships).<sup>[104]</sup>

Since the (fundamental) economic freedoms cover (solely) cross-border transactions, they necessarily imply a **prohibition of discrimination** on grounds of nationality, which in general terms

is laid down through article 18(1) TFEU and moreover specified with regard to single policy areas through various provisions of the same Treaty.<sup>[105]</sup> Similarly, the principle of equal pay for men and women was established at the very outset of the EEC and is now stipulated through article 157 TFEU. Furthermore, article 10 TFEU clearly proclaims anti-discrimination as an overarching principle of EU law, and article 19 TFEU confers to the EU a special competence for combatting contraventions of that principle. To this effect, a number of directives have been issued over time,<sup>[106]</sup> particularly with regard to employment,<sup>[107]</sup> and subsequently to the supply of goods and services.<sup>[108]</sup>

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Even beyond the legislative measures taken by the EU, the ECJ derives a general principle of equal treatment from the international law and constitutional traditions that are common to the Member States, which it tentatively applies to labor and company law.<sup>[109]</sup>

In the field of labor law, the ECJ proclaimed the unlawfulness of unequal treatment on the grounds of the worker's age (**Mangold case of 2005**).<sup>[110]</sup> The Court seemed to take a different stance with regard to the principle of equal treatment for minority shareholders in a capital company (**Audiolux case of 2009**).<sup>[111]</sup>

More recently, the Court of Justice

also derived the non-discrimination principle from the CFR in a case of unfair treatment based on the employee's age (Küçükdeveci case of 2010). [112]

The purpose of protecting economic freedoms is not only to prevent preferential treatment of professionals who are citizens of the nation in question (or professionals only working across national markets) over professionals from other Member States (or professionals also working in other States) but to promote as well the effective liberalization of the economy and the law in each Member State. [113]

Moreover, the ECJ acknowledged that these fundamental freedoms give legal subjects the possibility to choose between the various State laws, for example, to elect where the seat of a company is to be registered (**Centros** case of 1999; [114] on this case, see *infra*, ch 11, para 1.2.1.1); particularly, the ECJ ruled that the choice of a

<sup>252</sup> national legal system that may better satisfy the interests of the parties involved (**forum shopping**), does not *per se* amount to an abusive practice (see *supra*, ch 10, para 4.3). Competition between the Member States' legal systems has been thus decidedly enhanced. [115]

The bulk of European competition law was already regulated by the Rome Treaty on the EEC as part of the 'Community policy', [116] being an essential component of the legal framework of the

market.<sup>[117]</sup> At the EU level,<sup>[118]</sup> competition law is primarily constituted by antitrust law, embedding the prohibition of restrictive agreements, stipulated through article 101(1) TFEU,<sup>[119]</sup> and that of the abuse of a dominant position, stipulated through article 102(1) TFEU.<sup>[120]</sup>

These principled provisions of the founding Treaties are supplemented by regulations and directives, for whose issue a special competence is conferred to the EU through article 103 TFEU; particularly of note are the directive on private enforcement of antitrust law,<sup>[121]</sup> which regulates actions for damages,<sup>[122]</sup> and the regulations on block exemptions from the prohibition of restrictive agreements.<sup>[123]</sup>

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### 1.5.2. At the secondary level

At the secondary level, organizational issues for businesses (and other professionals) are addressed by labor law (or employment law),<sup>[124]</sup> company law (see *infra*, ch 11, para 1.2.1),<sup>[125]</sup> as well as by intellectual property law (including industrial design).<sup>[126]</sup>

The EU competence on labor law (or employment law) is based on articles 151-164 TFEU. Legislative measures issued by the EU deal with; 1) the free movement of

workers; 2) equal treatment (non-discrimination); 3) individual employment rights; and 4) collective labor relations.<sup>[127]</sup>

The EU thirteen directives on company law revolve around: 1) setting up a company, including capital and disclosure requirements; 2) company operations involving more than one country; 3) restructuring of a company (domestic mergers and division, transfer of seat); 4) guarantees concerning the financial situation of companies; and 5) the cross-border exercise of shareholders' rights. Furthermore, the EU enacted a number of regulations aimed at creating and governing some EU legal entities that coexist with national rules. Thus far, the following EU legal entities have been introduced: 1) the European Company, or *Societas Europaea* (SE);<sup>[128]</sup> 2) the European Cooperative Society, or *Societas cooperativa Europaea* (SCE);<sup>[129]</sup> 3) the European Economic Interest Grouping (EEIG).<sup>[130]</sup> Additionally, the following entities have been proposed and are still underway: 1) the Sole Proprietorship, or *Societas unius personae* (SUP);<sup>[131]</sup> 2) the European Foundation, or *Fundatio Europaea* (FE).<sup>[132]</sup>

The main provision on intellectual property is embodied in the

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directive ruling its private enforcement, [133] and the directive on industrial design is also worthy of mention. [134]

From the mid-1980s onwards, a **contract law** was progressively enacted by the EU in order to rule transactions entered into by businesses, mostly with consumers. Therefore, it is commonly assumed that EU contract law should be conceptualized as consumer law. Widespread though this assumption may be, it does not fully grasp the inner rationality of EU contract law, nor account for its overall structure. In fact, the attention of the EU legislature is mostly drawn to **business-to-consumer (or B-to-C) transactions**, because they are characterized by a structural asymmetry between the contracting parties that calls for legislative protection for the weaker of the two, ie the consumer. In contrast, in **business-to-business (or B-to-B) transactions**, the contracting parties are generally on the same footing, and, therefore, their private autonomy is paramount and must not be controlled or limited by the legislature (with the exception of competition law). The fact that EU contract law is concentrated on transactions between businesses and consumers, however, does not mean it does not deal with transactions between businesses as well. Although less frequent, there is still some engagement, particularly when one of such businesses is weaker than the other (**B-to-b transactions**).

In this vein, it should be pointed out that almost all the directives on European contract law were adopted on the basis of article 114 TFEU, which allows an ordinary legislative procedure for measures contributing to the approximation of law required to achieve the internal market as set out through article 26 TFEU.

After the Treaty of Amsterdam (see *supra*, ch 8, para 1.1), consumer protection was set out in the founding Treaties as an autonomous competence of the EC/EU. Nevertheless, EU measures aimed at attaining that goal must be ‘adopted pursuant to article 114 in the context of the completion of the internal market’ (article 169(2)(a) TFEU), unless they merely ‘support, supplement and monitor the policy pursued by the Member States’ (article 169(2)(b) TFEU).

As a consequence, consumer protection as such may not be deemed to constitute the underpinning or the rationale of EU contract law but only to describe the scope of most of it; like the rest of EU private law, EU contract law may be better understood as market law (see *supra*, ch 8, para 1.5).

Article 114(3) TFEU mandates the Commission submit proposals that provide for a ‘high level’ of consumer protection.

In order to determine the scope of

EU contract law, the ECJ referred to the ‘average consumer’, [135] defined as a consumer that is ‘reasonably well-informed and reasonably observant and circumspect’. [136] This definition was subsequently crystallized in the directive enacted by the European Union in the field of contract law. European legislation only sporadically addressed to particular groups of consumers that may be vulnerable due to their mental or physical infirmity, age or credulity. [137]

EU contract law may be subdivided into a general part and a special part.

The general part of EU contract law entails sets of rules that apply to a contract irrespective of its type (whether a sale or a loan, etc.); they address marketing techniques or commercial practices that may impair the informed and genuine consent of consumers (or, although rarely, undertakings) to enter into a contract.

The Unfair Trading Directive of 2015 regulates the pre-contractual stage of the offer, or the invitation to treat, issued to consumers, banning commercial practices that may be deemed misleading or aggressive to the consumers’ detriment. [138]

The Consumer Rights Directive of 2011 poses extensive duties of the contracting businesses to disclose information, both during pre-

contractual negotiations and the execution of the contract. A more stringent regime is provided for off-premises and distance contracts, where a right of withdrawal is also granted to the consumer (albeit within a restricted period of time).

The Unfair Terms Directive of 1993 strikes out the terms of standard contracts that ‘contrary to the requirement of good faith, [cause] a significant imbalance in the parties’ rights and obligations [...], to the detriment of the consumer’ (article 3(1)).<sup>[139]</sup> The Late Payment Directive of 2011 addresses the remuneration of B-to-B transactions and rules damages owed for its late payment.<sup>[140]</sup>

Under the Sales of Goods Directive of 2019,<sup>[141]</sup> the seller must guarantee for a minimum period of two years that the goods (which may entail digital elements) delivered to the consumer that purchased them conform with the contract between the parties. In this, the burden of proof is reversed in favor of the consumer. A similar provision is included in the Supply of Digital Content Directive of 2019.<sup>[142]</sup>

The special part of EU contract law comprises sets of rules addressing contracts relating to goods or services that, due to the difficulty and technicality of information needed to evaluate them, are purchased on the basis of credence

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given to the supplier. In most cases, the structural information asymmetry thus resulting between the contracting parties affects the purchaser irrespective of her being a consumer or another business (except if trading the same goods or services). This is the case for most contracts concluded for the trade of financial services, particularly banking, investment, and insurance contracts.

In the **banking** sector, the Consumer Credit Directive of 2008 covers credit agreements directed at the purchase of consumer goods; [143] the Mortgage Directive of 2014 those for the purchase of residential immovable property. [144] The Payment Services Directive of 2015 (PSD 2) is also worth mention, [145] which applies to any client, be it a consumer or (with exceptions) a business.

An overall regulatory framework of **investment market and contracts** is set out by the directive of 2014, commonly known as MiFID 2, [146] complemented by an *ad hoc* regulation (MiFIR). [147] A special provision addresses the distance marketing of consumer financial services. [148]

In the **insurance** sector, [149] the main EU provision is that of the Directive on Insurance Distribution (IDD) of 2016. [150]

EU legislature took on some types of

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tourist arrangements, which provide complex combinations of goods and services and therefore require information that is too complex for the consumers purchasing them. Timeshare contracts were thus regulated,<sup>[151]</sup> as well as those selling package tours.<sup>[152]</sup>

A very specialized sector of EU contract law (and largely embedded in public law) is that of **public procurements**.<sup>[153]</sup>

Finally, the **private international law** of the Member States has been largely unified through EU regulations (see also *supra*, ch 3, para 4).

PIL regulations were enacted by the EU on the basis of article 81 TFEU, which confers the competence on ‘judicial cooperation in civil matters’.

With regard to the law applicable to contractual obligations, the **Rome I Regulation** of 2008<sup>[154]</sup> eventually took the place of the **Convention of Rome** of 1980, which, however, is still in force for dealings with countries outside the EU. Obligations arising from sources other than contracts (mainly, torts and unjustified enrichment) are covered by the **Rome II Regulation** of 2007.<sup>[155]</sup> The **Rome III Regulation** of 2010 deals with the law applicable to divorce and legal

separation.<sup>[156]</sup>

For the conflicts of law on civil proceedings and the recognition and enforcement of foreign judgments in civil and commercial matters, the main source is the Brussels I Regulation of 2001.<sup>[157]</sup> The Brussels II *bis* Regulation of 2002 provides for the same aspects of matrimonial matters and the matters of civil responsibility.<sup>[158]</sup>

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The general rule of European private international law grants the parties the **freedom of choice** of the law applicable to their relationship (article 3 Rome I Regulation; article 14 Rome II Regulation; article 5 Rome III Regulation).<sup>[159]</sup> It thus engendered a proper market of rules, which is based on the **competition between the Member States' legal systems** (see *supra*, ch 8, para 1.5.1).

However, several exceptions to that general rule of freedom of choice are set forth. In contract law, for example, **consumers** cannot be deprived of the protection afforded to them by the law of the country where they have their habitual residence (article 6(2) Rome I Regulation), provided that the professional either (a) pursues commercial or professional activities in the country of habitual residence, or (b) by any means directs such activities to that country or to several countries including that country (article 6(1) Rome I Regulation).

When a trader presents her activity on her

website, or on that of an intermediary, the question arises whether she ‘directs’ such activity to other countries, since consumers of the latter can log on the website and through it enter into a contract with the trader. If the question is answered in the affirmative, then the trader must possibly draft 27 forms of contract, one for each Member State whose consumers could not be deprived of the legal protection afforded.

In the *Pammer and Hotel Alpenhof* joined cases of 2010, [160] the ECJ answered that question by ruling ‘it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader’s overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States’. Furthermore, the ECJ laid down a (not exhaustive) list of circumstances that are conductive for such an ascertainment: ‘the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code,

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outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States'. On the other hand, 'the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established'.

In tort law, one of the most important cases where the freedom of choice is barred is that of the acts of **unfair competition** (article 6(4) Rome II Regulation).

Furthermore, it must be pointed out that even when the parties are free to choose the law applicable to their relationship, they cannot derogate from the **overriding mandatory provisions** of the law that would otherwise apply according to the rules of private international law (article 9 Rome I Regulation; article 16 Rome II

Regulation; article 10 Rome III Regulation).<sup>[161]</sup>

Overriding mandatory rules are those provisions of national law ‘with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and on all legal relationships within that State’ (Arblade case of 1999).<sup>[162]</sup>

In addition, the application of single provisions of the law chosen by the parties may be refused if it is manifestly incompatible with the public policy (*ordre public*) of the forum (article 21 Rome I Regulation; article 26 Rome II Regulation; article 12 Rome III Regulation).<sup>[163]</sup>

The public policy (*ordre public*) of the Member States *inter alia* entails the competition rules set forth in the founding Treaties (Swiss case of 1999),<sup>[164]</sup> as well as consumer protection granted by EU law (Mostaza Claro case of 2006).<sup>[165]</sup>

## 2. The European common core of national private laws (*acquis commune*)

### 2.1. Concept and history

In recent decades, the idea that national laws share a common core that may be deemed European has gained a growing consensus and has been developed in different ways.

One of them is to be found in the **Common Core Project**, started in 1995 at the University of

Trento by Ugo Mattei and Mauro Bussani.<sup>[166]</sup> In general terms, this project follows the Cornell Studies' methodological approach, developed by Rudolf B. Schlesinger (without referring to the European context) during the 1960s (see *supra*, ch 3, para 2).<sup>[167]</sup>

Schlesinger's research method entailed questionnaires that every participant had to fill out to provide a very detailed case law of her own jurisdiction. This great number of cases was published together with some introductory contributions in a book series devoted to monographs.<sup>[168]</sup>

A similar methodological approach also characterizes works with a dominant didactic function, like the *Ius commune Casebooks for the*

<sup>261</sup> Common Law of Europe series,<sup>[169]</sup> which were initiated by Walter van Gerven, following the North American model of *Text, Cases and Materials*. In German, it is worth mentioning the monumental handbook of Filippo Ranieri on *Europäisches Obligationenrecht*.<sup>[170]</sup>

A further step was taken, starting from the 1980s, when the prospect of a European codification launched by the Parliament (see *infra*, ch 8, para 3) induced some study groups, composed of private law scholars from different countries, to draft projects on European private law. The latter are hence the result of purely private initiatives, even if some of them were supported, sometimes financially, by European institutions.

These works, which to a certain extent demonstrate similarities with the model of the restatements drafted by the American Law

Institute (see *supra*, ch 3, para 5),<sup>[171]</sup> have been drawn up on the basis of comparative research, aimed at finding the 'best solutions', namely the solutions that are better suited to achieving the harmonization of the law. In this regard, the solutions could also be made up of rules that are unknown in the majority of the legal systems, or that are unknown at all in the legal systems.<sup>[172]</sup>

Therefore, this constitutes a **law beyond the state**,<sup>[173]</sup> which may be defined as European and scientific.<sup>[174]</sup>

It may be defined as European law ,<sup>[175]</sup> because it represents the common core of the national legal systems of the Member States and mirrors their historical core remaining on the tradition of

<sup>262</sup> Roman law.<sup>[176]</sup> However, it may also be defined as scientific law,<sup>[177]</sup> given the fact that it was made by private law scholars (and not by the holder of sovereign power) through the application of doctrinal methodology (and not dependent on legislative needs of policy).

This does not detract from the projects dealt with here: they were drafted according to the usual

standards of the legislature,<sup>[178]</sup> and resemble a true civil code (or part of it) in nature.<sup>[179]</sup> They are referred to as principles solely because they are not binding in a positivistic sense (see *supra*, ch 6, para 3), not belonging to an individual legal system; yet, they consist of black-letter rules, which are precise in their content and germane to a would-be enforcement.<sup>[180]</sup>

In fact, the projects addressed here not only represent academic endeavors of great significance, but also proved to be effective as model laws, which influenced the existing and the forthcoming law, both at the national and at the EU level. Therefore, they indicate a path for the creation of uniform law, which is an

alternative to legislation,<sup>[181]</sup> especially with

respect to a European civil code.<sup>[182]</sup>

Furthermore, private parties may agree to elect these projects with as the law to be applied to their legal relationships, insofar as it is allowed by private international law (see *infra*, ch 8, para 2.2).

Far from merely being a gigantic patchwork of preliminary drafting of a would-be European civil code, they may therefore be deemed to represent

sources of soft law,<sup>[183]</sup> ie law that operates in the framework of interpretation as supplementary to national law and as an alternative to it, insofar as such a choice is permitted for the involved

<sup>263</sup> parties.

## 2.2. European restatements and model laws regarding contracts

Given the possible contents of a future European codification of private law, and more generally, of the competences conferred to the EEC/EC/EU, it is natural that, at least at the outset, such scientific projects were focused quite exclusively on contract law .

In addition, contract law is the field of private law that more naturally fits internationalization and harmonization, as demonstrated by the CISG and its predecessors (see *supra*, ch 3, para 5 ).

The CISG has to be considered the point of reference for the most successful project of a European and scientific private law, namely the **Principles of European Contract Law** (PECL), or the Lando (commission's) principles.

The PECL were prepared and discussed at the beginning of the eighties and published in three volumes between 1995 and 2002.

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Colloquially, they are also known as Lando Principles, as they are often identified with Ole Lando, who acted as the initiator of the whole project and subsequently as chair of

the Commission,<sup>[185]</sup> which elaborated the rules and whose members came from different European States. The individual

provisions and comments were presented by rapporteurs, subsequently discussed in plenary meetings and then adopted (with the necessary amendments).<sup>[186]</sup>

Part I, which encompasses 59 articles, concerns performance, non-performance and undue performance (as well as remedies for such), was drafted between 1981 and 1982, and published in 1995.<sup>[187]</sup> The German version was published in 1995,<sup>[188]</sup> the French in 1997.<sup>[189]</sup>

In 2000, a revised version of Part I was published, together with the new Part II, which contains 73 articles and concerns conclusion, validity, interpretation, contents and effects of contract, and authority of agents.<sup>[190]</sup> The Italian version was

published in 2001,<sup>[191]</sup> the German in 2002.<sup>[192]</sup>

Part III, which has 69 articles and concerns plurality of parties, assignment of claim, substitution of new debtor and transfer of contract, set-off, prescription, illegality, conditions, capitalization of interest,

was published in 2002.<sup>[193]</sup> The French Version was released in 2003,<sup>[194]</sup> the German in 2003 and 2005.<sup>[195]</sup>

PECL's analogous features are shared by the  
Principles of International Commercial

Contracts (PICC),<sup>[196]</sup> which, however, being prepared by the UNIDROIT (see *supra*, ch 3, para 5), go beyond a pure European dimension and constitute instead a project of global law.<sup>[197]</sup>

The working group that drafted the PICC was set up in 1980 by the UNIDROIT Directorate and led by Michael Joachim Bonell.<sup>[198]</sup>

The 1994 version consisted of 120 articles dealing with the conclusion of contract, validity of contracts (including defects of will), the interpretation and content of contracts, performance, and (remedies for) non-performance.

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The 2004 version consisted of 185 articles,<sup>[199]</sup> which represented an extension and improvement of the preceding version.<sup>[200]</sup>

The 2010 version consisted of 2010 articles,<sup>[201]</sup> as does the 2016 version,<sup>[202]</sup> which was extended particularly to issues related to long-term contracts.<sup>[203]</sup>

Every version was translated into a plurality of languages by the UNIDROIT.

The PICC may be understood as a modern

rationalization of the *lex mercatoria*,<sup>[205]</sup> namely as a collection of commercial customs that concern international transactions (see also *supra*, ch 7, para 3). As a consequence, the PICC exclusively address commercial contracts, as suggested by their title, and therefore do not apply to consumer contracts; by contrast, the PECL do not provide for a similar restriction of their scope, so that they may be deemed to be applicable to consumer contracts as well, it being understood that, as implied by article 1:103(2) PECL, consumer protection rules provided for by EU law are mandatory and overriding in the sense of article 7 Rome I Regulation (see *supra*, ch 8, para 1.5.2).

This difference in the subjective scope of the PECL and the PICC does not detract them from being quite comparable and, to a certain extent, similar.<sup>[206]</sup> This is due to the fact that, albeit addressing exclusively commercial contracts, the PICC do not provide for a commercial law *stricto sensu* but for a market law that amounts to general contract law.

Over time, the PECL and the PICC proved quite influential on national as well as on uniform and EU law.

This influence on national legal systems was enabled by the fact that the PECL (as the PICC) have been referred to in some civil codifications.

<sup>266</sup> [207] Moreover, they served also a model for the codification of private law in countries of middle

and eastern Europe, which recently entered the EU.<sup>[208]</sup>

Moreover, national courts referred to PECL<sup>[209]</sup> and PICC<sup>[210]</sup> in order to check new solutions and suggestions of national private law on a European level.<sup>[211]</sup> This development seems particularly remarkable if one considers that this has involved both common law legal systems and some characteristic constructions of continental private law, such as the principle of good faith<sup>[212]</sup> and *culpa in contrahendo*.<sup>[213]</sup>

<sup>267</sup> The PICC more than the PECL have been applied as general principles of law (or *lex mercatoria*) in arbitration,<sup>[214]</sup> also to interpret and meet the shortcomings of national legislations and instruments of international law. Particularly, they have been referred to by arbitration tribunals to interpret and fill the internal gaps of the CISG, ie issues covered but not explicitly regulated by it.<sup>[215]</sup>

On the level of EU Law, PECL and DCFR were quoted several times by the Advocate General of ECJ, in order to promote determinate (harmonized) solutions.<sup>[216]</sup>

Where contracting parties have agreed upon an arbitration clause, their right to also choose the PECL or the PICC as the law to be applied to their contract is undisputed and implicitly allowed by article 28(1) UNCITRAL Model Law on International Commercial Arbitration.<sup>[217]</sup> In case such a choice is lacking, the PECL or the

PICC could be nonetheless applied by the arbitral tribunal, since most national and international rules on arbitration allow arbitration tribunals to apply the most suitable ‘law’, or ‘rules of law’, and that could be identified precisely in the PECL or the PICC; article 28(2) UNCITRAL Model Law on International Commercial Arbitration, however, seems to support the opposite view, [218] since it mandates the arbitration tribunal to apply ‘the conflict of laws rules’. [219]

Should the contracting parties not have agreed upon an arbitration clause, it is disputed whether they can make the choice of the PECL or the

**PICC as the law to be applied to their contract.**

[220] The positive answer is possibly suggested by recital 13 of the Rome I Regulation, but is not provided for by its articles (even more significantly, it was struck out of the initial proposal).

Recital 13 of the Rome I Regulation refers explicitly to ‘non-state body of law’ and sets forth that the parties can incorporate it by reference into their contract.

Under the traditional conception of private international law, this question should be answered in the negative, [221] because, absent any conflict of law, the will of the contracting parties cannot stand as a connecting factor. If private international law is understood as enabling the private autonomy of the contracting parties

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beyond national borders, however, its function is not necessarily that of solving conflicts of law, and the will of the contracting parties is not necessarily confined to the role of connecting factor, thus becoming the source itself of the contract law. Article 3 (Rules of law) of the Principles of Choice of Law in International Commercial Contracts of 2015 supports this view, [222] in that it states: ‘The law chosen by the party may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise’. [223]

On the other hand, the *Code européen des contrats*, [224] drafted by the Accademia dei Giusprivatisti Europei, [225] must be acknowledged as having its own particular character.

The proposal was first presented by the initiator of the whole project, Giuseppe Gandolfi, in the framework of the conference organized by the Italian private law scholars’ association in June 1989. [226] It was not until 1995 that the Accademia decided to elaborate model rules.

The *Code* has followed two different models. [227]

On the one hand (and at the beginning), it took inspiration from the fourth book of the Italian civil code. This decision was based on two reasons. First, the Italian civil code represented a synthesis

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between the two great codifications of France and Germany. Due to the comprehensive approach which encompasses both civil law and commercial law, the Italian civil code is more modern and closer to English law than the French or the German Civil Code.

On the other hand, the project under analysis followed the Contract Code drafted by Harvey McGregor. The only existing edition of this work was presented to the public during a conference in Pavia in 1990.

[228]

In the 1960s, McGregor was appointed by the English Law Commission to draft the first version of a codification of English contract law, which had to be discussed by the members of the Commission. During the works, the Scottish Law Commission, which in the meantime had stepped into the project, was disappointed by McGregor's work, even though the latter followed their suggestions with specific regard to the elimination of the doctrine of consideration and the recognition of contracts in favor of third parties. The project was ultimately abandoned.

The *European Code of Contracts* was originally discussed and drafted in French and subsequently translated into English (and in other European languages). This contrasts with the

PECL, which were drafted partly in English and in French.

## 2.3. European restatements and model laws regarding other areas of private law

Notwithstanding the position of prominence gained by contract law in the framework of the Europeanization of private law, one has to also consider attempts to harmonize the law of obligations in different (European) States, as it is witnessed by the Italian-French Obligations *Project* - *Franco-Italian project du code des obligations*,

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<sup>270</sup> published in 1927.<sup>[229]</sup> In addition, it must be particularly pointed out that PECL's third part, even if primarily devoted to contract law, contains rules for a general part of the law of obligations.

<sup>230</sup>

Moreover, the Principles of European Tort Law (PETL) cover one of the most important fields of extracontractual law of obligations,<sup>[231]</sup> that of liability for unlawful damages inflicted on someone else.

They were drafted by the European Group on Tort Law (colloquially also called 'Tilburg Group'), which worked in Vienna together with the European Center of Tort and Insurance Law (ECTIL) and the Institute for European Tort Law (ETL) of the *Österreichische Akademie der Wissenschaften*.

Helmut Koziol was the initiator of the whole project and long-standing

director of ECTIL and ETL.<sup>[232]</sup>

The law of **unjustified enrichment** was addressed by the seventh book of the DCFR.

With respect to **ownership and the other property rights**, the DCFR has encompassed the transfer of ownership of chattels, security property rights, and trusts. Since 1996, some Principles of European Trust Law have been drafted by the Business and Law Research Center of the Radboud University and were published in 1999.<sup>[233]</sup>

In the field of **family law**, one has to mention the Principles of European Family Law,<sup>[234]</sup> which

were drafted by the Commission on European Family Law (CEFL).<sup>[235]</sup> To date, the Commission has published three parts of these Principles, namely the Principles regarding divorce and

271 maintenance between former spouses in 2004,

<sup>[236]</sup> the Principles regarding parental

<sup>237</sup> responsibility in 2007<sup>[237]</sup> and the Principles regarding property relations between spouses in

<sup>238</sup> 2011.<sup>[238]</sup>

A Feasibility Study of Principles for a Data

Economy was recently published,<sup>[239]</sup> as the result of a common project run by the European Law Institute and the American Law Institute.

<sup>240</sup>

### 3. The perspective of a European codification of private law

The EU Parliament has repeatedly urged the adoption of a European civil code.<sup>[241]</sup>

The Commission has also suggested that this proposal should be evaluated as a desirable option of EU legislative policy, specifically as part of the critical review of European contract law that has been undertaken.<sup>[242]</sup>

Nonetheless, in the public consultation launched on this issue, most of the opinions of the institutions and stakeholders involved were negative. This fact led the Commission to proceed more cautiously than originally planned. In the so-called Action Plan that was included in a 2003 communication to ensure higher consistency

within European contract law,<sup>[243]</sup> the Commission concluded that the idea of a European civil code was not realistically feasible. Moreover, it suggested that as well as improving the quality of *acquis communautaire*, a **Common Frame of Reference** should be set in order to establish common principles and language in the realm of contract law.<sup>[244]</sup>

In the meantime, such a project has been fulfilled by some international groups of academic jurists and published under the title of **Draft Common Frame of Reference** (DCFR), first in the so-called

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<sup>272</sup>

*interim edition* of 2008,<sup>[245]</sup> and then in the final version of 2009.<sup>[246]</sup> The project was initiated by Christian von Bar.

In reality, the DCFR was conceived from the outset as the precursor of a proper civil code according to the traditional model established in

the nineteenth century.<sup>[247]</sup> The Commission's political caution, however, and the unfavorable reaction of most European civil law scholars led its editors to present it more modestly as a 'toolbox', i.e. as a repertoire of possible reference models, or as a shared vocabulary to be used by the European legislator and by each Member State.

To this effect, the DCFR envisaged merging the two tiers of European contract law that had developed separately from one another until then, i.e. the *acquis communautaire* (as collected in the ACQP) and the *acquis commune* (as collected in the PECL,<sup>[248]</sup> whose terminology and conceptual framework, however, were considerably altered,<sup>[249]</sup> not always with good reasons) (see also *supra*, ch 8, para 2.2). The outline edition also considered the *Principes directeurs du droit européen du contrat*, which were the result of an initiative of the Association Henri Capitant des Amis de la Culture Juridique Française and the Société de Législation Comparée and published in 2008.<sup>[250]</sup>

The drafters of the DCFR envisaged traversing not

only contract law in general but also individual types of contracts (like that of sale, etc.); moreover, they intended to take the project a step further in covering patrimonial law as a whole.

<sup>251</sup> [Materials for the provisions on special contracts and other branches of private law (like unjustified enrichment, trusts, etc.) were drawn from the Principles of European Law (PEL), drafted by the Study Group on a European civil code and published in 2006-2010.]<sup>252</sup> In addition, one must mention the Principles of European Insurance Contract Law (PEICL),<sup>253</sup> which were prepared as a contribution to the DCFR, but further pursue the goal of creating an autonomous Draft Optional Instrument of European Insurance Contract Law.<sup>254</sup>

The PEICL were drafted by the Project Group Restatement of European Insurance Contract Law, founded in September 1999. Its founder and chair was Fritz Reichert-Facilides.

Their first edition was published in 1999,<sup>255</sup> the second edition followed in 2016.<sup>256</sup>

After the abandonment of the goal to enact a European civil code, the Commission drew on the provisions of the DCFR addressing sale contracts and wrapped them into a proposed regulation on

<sup>257</sup>  
a Common European Sales Law (CESL),  
published in 2011 and approved, albeit with  
<sup>274</sup> significant changes, by a large majority of the

<sup>258</sup>  
European Parliament on 26 February 2014.  
In the accompanying report, it was expressly held that the CESL was designed to create a second, parallel system of contract law within the legal order of each Member State of the EU. This system would have been in addition and alternative to national rules.<sup>259</sup>

Despite the Commission's efforts, the adoption of that regulation would have led to an unprecedented crisis in European private law, irreversibly transforming not only its basic structure but also its very constitutional legitimacy.

It is, therefore, not surprising that the proposal for a CESL sparked vigorous debate among civil law scholars.<sup>260</sup> Most importantly, however, it was subject to hostile response from some of the leading Member States. These States indeed officially held that the proposal was in breach of the principle of subsidiarity enshrined in article 5 TEU, and, in any case, excessive in connection with the institutional objectives of the legislative procedure established by article 114 TFEU. This view was especially backed by the German *Bundesrat* and the House of Lords, as well as the Austrian and Belgian Parliaments.

Consequently, the CESL legislative proposal was

withdrawn by the Commission on 16 December 2014.<sup>[261]</sup> This event marked a turn in the making of private law at the European level, which faced the risk of an unparalleled failure as a whole.

<sup>275</sup> In summation, the political, social, and cultural conditions that constituted fertile ground for the major codifications crowning the formation of the national state,<sup>[262]</sup> do not exist at a European level.<sup>[263]</sup>

First, the EU never gained a general competence; neither for private law, nor any of its main branches (like contract law); due to the constitutional principle of conferral, the feasibility of a European civil code is, therefore, seriously challenged.<sup>[264]</sup> It is true that the EU nevertheless passed pieces of legislation on crucial sectors of private law (and especially of contract law), but they were based on article 114 TFEU, that entrusts the EU with the power to ‘adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States’. This legal basis, by contrast, would be unfit for a unification of private law like that envisaged through a prospective European civil code, which would override (and not harmonize) the Member States’ private law. Nor are other legal bases for such a piece of European legislation otherwise provided for by the founding Treaties.

Moreover, the principle of subsidiarity binds the EU legislature to give priority to the legislative

power of Member States (vertical subsidiarity), as well as to the freedom of individuals (horizontal subsidiarity) to choose which law should govern their contracts and, more generally, their obligations. Therefore, it thus erected a major constitutional barrier to the enactment of a European civil code,<sup>[265]</sup> at least if such code is designed according to the canons that historically have underpinned civil codes since the introduction of the *Code Napoléon* paradigm (see *supra*, ch 4, para 3.1.1).<sup>[266]</sup>

Although EU private law overrides national private law (see *supra*, ch 8, para 1.3), the latter still plays a crucial role in the interpretation and supplementation of the former, starting with its general principles. It is, in a way, a peculiar manifestation of the ‘paradox of Böckenförde’, according to which the liberal state (*Rechtsstaat*) rests on preconditions that it cannot constitutionally guarantee itself.<sup>[267]</sup> Moreover,

<sup>276</sup> domestic jurisdictions are still paramount in all the domains of private law that fall outside the institutional aims and the legislative competence of the EU, a competence that is rather limited when compared to the Member States’ sovereignty.

The constitutional principles of conferral and subsidiarity bind the EU legislature to coexist and to interact mutually with the national laws of the Member States,<sup>[268]</sup> thus creating a multi-levelled system,<sup>[269]</sup> where both the legal system

of the EU and those of the Member States have to coexist and to interact.

More than creating a private law of its own, the EU may therefore be said to have accomplished a Europeanization of private law.

Legal pluralism – namely the coexistence and competition of different jurisdictions and legal systems within the same community – has historically marked the beginning of the Western legal tradition,<sup>[270]</sup> and it has also represented an extraordinary driver of political and economic development for Europe.<sup>[271]</sup>

A Union of twenty-seven nation States, where twenty-four different languages are spoken and where numerous civil codes – issued between the nineteenth and twentieth centuries – are in force

<sup>277</sup> does not really resemble a single state,<sup>[272]</sup> not even a federal one. Rather, it resembles a multinational empire,<sup>[273]</sup> for which the motto '*In varietate concordia*'<sup>[274]</sup> is well suited.

The lasting worth of the endeavors to forge a European private law remain of course untouched, since it laid the foundations of a European scholarship of private law. This achievement may be acknowledged in monumental works like the *Commentaries on European Contract Law*, edited by Nils Jansen and

<sup>278</sup> Reinhard Zimmermann.<sup>[275]</sup>

## Glossary

## Biographies

## CHAPTER 9

### Legal facts and legal acts

- The legal relevance of natural events and human actions
- Taxonomies of legal facts and legal acts
- The centrality of (autonomous) legal acts in private law

All events and actions that are legally relevant are classified as legal facts.

Material facts are natural events that are of legal effect. They may also be human actions that carry legal effect irrespective of any judgment or discernment by the author/-s.

Heteronomous legal acts are human actions whose legal effects are not elected by the author/-s but are stipulated by the law irrespective of her/their intention. Such acts are ineffective (or subject to avoidance), where there has been no judgment or discernment by their author/-s.

Autonomous legal acts consist in one or more declarations of will (be it through language or by conduct) that are intended to achieve a change in the rights and duties of the author/-s (or – albeit rarely, if not exceptionally – those of a third party). The most notable legal acts are contracts, last wills (or testaments), and marriage.

Legal acts may be unilateral, bilateral, or multilateral; patrimonial or non-patrimonial; *inter vivos* or *mortis causa*.

Legal acts are subject to invalidity when they either: *a)* infringe or circumvent a mandatory prohibition, be it provided for by a statutory provision or embedded in public policy; or *b)* one of their authors' will is flawed by a deficiency of judgment or discernment. This

may happen either: *a*) because one of the parties was incompetent, ie she had no capacity to act; or *b*) because one of the parties' consent was affected by a vitiating factor such as mistake, fraud and misrepresentation, duress and undue influence.

Invalidity may result in voidness (or nullity) or in voidability.

In the event of voidness (or nullity), a legal act is wholly ineffective from the outset (*ab initio*), whether or not any of the parties has disaffirmed it. A legal act may be void because it is illegal, or because it is affected by indefiniteness or vagueness, or it lacks some formal requirements (like when a statutory provision requires a contract to be in writing). Any of the parties or a third person can invoke a legal act's voidness, which can be also raised by a court on its own motion. The non-performance of any party is excused. In the event of performance, each party can claim restitution for it, even from any sub-purchaser (with certain exceptions). Voidness cannot be remedied, unless differently provided for by the law.

By contrast, a voidable juridical act is effective, until its avoidance (or rescission, or annulment) occurs at the election of the innocent party (eg the minor). If it is avoided, it is retrospectively (*ab initio*) reversed.

The innocent party (eg the minor) has the power-right to avoid a voidable legal act, either: *a*) by bringing an action before a court against the other party (in some jurisdictions); or *b*) by serving notice on the other party (in other jurisdictions). Non-performance of the innocent party is excused solely if it occurs after avoidance, in which case each of the parties can claim restitution for any previous performance. Affirmation (or confirmation, or

ratification) of a voidable legal act is generally allowed but conditionally on the fact that the ground of avoidance has terminated. It may happen through the innocent party's waiver of her claim to avoidance (express affirmation, or confirmation, or ratification). It may also take place through voluntary performance of the voidable contract (implied affirmation, or confirmation, or ratification).

## 1. The legal relevance of natural events and human actions

Not any event that may take place or any action that may be undertaken triggers legal effects. In fact, some of them do not have any impact on social intercourse and, therefore, need not be scrutinized or regulated by the law. Others may involve some sort of societal compulsion but nonetheless are clearly outside the realm of the law, as they do not involve any proceedings in front of the state (eg they pertain to **etiquette**). If one violates a rule of etiquette, she may incur social disapproval, consisting of some negative reaction by other members of society. However, there is no room for a **sanction** (see *supra*, ch 6, para 1.1), unless a norm can be found mirroring such a rule of etiquette. In the latter case, however, the sanction is stipulated by the norm, not by the rule of etiquette that it mirrors.

Moreover, events or actions that are originally of no **legal effect** can begin to produce it starting from a certain point of time on, insofar as a norm enters into force providing for such model fact situations. Conversely, events or actions that originally carry some legal effects may cease to produce them from a certain point of time on, insofar as a norm enters into force reversing or

<sup>295</sup> repealing pre-existing law.

For example:

a) Same-sex partnerships, which until recently were not allowed or not in any event recognized under the law, have over time been allowed and in some way recognized as (akin to) marriage by most jurisdictions.

b) In some European jurisdictions in the 1930s, people of Jewish origin were expelled from public schools and universities, and also disqualified as officials. Being of Jewish origin was therefore a factual situation that produced such legal consequences. After World War II, these norms were repealed.

In the light of the above, one may wonder: 1) How it is possible to identify events or actions that carry legal effects; 2) How it is possible to verify whether such events or action subsequently cease to be of legal effect.

There is solely a tautological answer to these questions: an event or action carries legal effects if, and in so far as, a norm attaches legal effects to that event or action.

In other words, it is not possible to set out any criterion to distinguish what is *per se* legal from what is not. The same event or action may carry legal effects or not: it depends solely on what the norms actually in force provide for.

If a certain **state of affairs** is provided for by a norm (see *supra*, ch 6, para 1.1), we are confronted with an event or an action that carries legal effects. If such a state of affairs is not provided for

by a norm, the correlative event or action does not exist for the law, regardless of how material for society it may be. Therefore, events and actions that carry legal effects can be identified only by a recognition of all norms existing at a given time and by ascertaining which states of affairs such norms provide for.

A state of affairs provided for by a norm may consist of a single event or action whose occurrence will trigger the attached legal consequence. In this case, the **IF-clause** of the norm (see *supra*, ch 6, para 1.1) is simple.

If a chattel is delivered by the seller to the buyer, for example, the bare fact of the delivery makes the latter acquire its possession (eg material control).

However, this is not the most frequent scenario. Innumerable states of affairs instead consist of a whole chain of events and/or actions, and the correlative sanction is triggered only by the occurrence of the entirety of them. The **complexity of the IF-clause** is particularly remarkable when it consists of events and/or actions that are not supposed to happen simultaneously but rather in a consequential way.

In most jurisdictions, in order to transfer the property of a chattel to the buyer, not only the formation of a contract (of sale) is required, but also the fact that said chattel is

delivered by the seller to the buyer. Therefore, the transfer of property is performed through a combination of the conclusion of the contract and the delivery of the chattel. Although it is not necessarily the case, delivery may well be performed not simultaneously but subsequent to the conclusion of the contract.

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Any event or action that is included in the state of affairs provided for by a norm, whether it is simple or complex, is said to be of **legal relevance**. Even if the sanction is triggered only by a whole chain of events and/or actions, each of them may produce (partial or preliminary) legal effects (see *supra*, ch 6, para 1.1).

Although in most jurisdictions the conclusion of a contract (of sale) does not suffice to transfer the property to the buyer, it nevertheless obliges the seller to convey the sold thing to the former. This obligation serves the ultimate purpose of transferring the property.

By the same token, each of the natural events and/or human actions comprised in the factual chain of a norm may be regarded by another norm as a state of affairs on its own (**relativity of legal qualifications**). This helps to explain the reason why any given case or practical issue is generally regulated by many norms, which are, therefore, to be coordinated and applied simultaneously.

For example, the conveyance of real estate (see *infra*, ch 10, para 4.2.2) that is subsequent to a contract of sale may be regulated by the law of contract as well as by the law of property, to speak nothing of tax law, administrative law, etc.

A bank loan whereby the borrower promises to pay interests at a usury rate to the lender is a contract entered into the two parties and regulated by private law. At the same time, the bank's entering into a contract whereby her client promises to pay interests at a usury rate may be punished as a crime by penal law. The same action by the bank is therefore regarded as contractual consent under private law and as a crime under penal law.

All events and actions that are legally relevant are classified as legal (or juridical, or juristic) facts.

This concept is, therefore, the result of an analytical judgment, ie an assessment *a posteriori* (or *ex post*) that ascertains which model fact situations (or state of affairs) are provided for by norms.

Like other legal concepts (see *infra*, ch 10, para 1), that of legal facts is aimed at achieving a reduction and simplification of legal discourse, by summarizing the contents of a large number of norms and effectively conveying their meaning. In a sense, therefore, concepts like that of legal facts represent a metaphor for a norm, or for a number

of norms, or for their single elements.

Legal facts form a vast, highly heterogeneous mass, for they comprise events and actions of the most diverse nature: contracts and torts, someone's birth or someone's death, and so on. Intuitively, it would be unreasonable if they were treated in the same way by the law. For example, contracts and torts are both legally relevant, but, in a sense, they are so for quite opposite reasons: contracts are promoted, whereas torts are redressed by the law.

Therefore, within the same category of legal facts, which stands as a genus, a number of sub-categories are to be identified in order to distinguish and categorize the different kinds.

Each of these sub-categories stands as a species of legal facts, in the sense that each sub-category

<sup>297</sup> gathers those legal facts that are legally relevant in the same way and, therefore, sets them apart from the other legal facts that, pertaining to a different sub-category, are legally relevant in another way.

## 2. The German tripartite taxonomy of legal facts, heteronomous legal acts, and autonomous legal acts

In the late nineteenth century, Pandectists (see *supra*, ch 4, para 3.1.2) started developing an overall classification of legal facts on a group-by-group basis, which was further developed by German scholarship.<sup>[1]</sup>

A major role in that classification is played by the concept of *Rechtsgeschäft*, a term which has no precise translation in English but that may be referred to as a legal (or juridical, or juristic) act, or as a legal transaction (cf *infra*, ch 9, para 5).

The concept of *Rechtsgeschäft* was employed in the German Civil Code (BGB), which devotes a set of rules to it (§§ 104-185 BGB) in the context of its ‘General Part’ (*Allgemeiner Teil*) (see *supra*, ch 4, para 3.1.2).<sup>[2]</sup> Nonetheless, the BGB does not provide any specific definition of this concept.<sup>[3]</sup>

According to its usual understanding, such a legal act consists in someone’s declaration of will (be it through language or by conduct) that is intended to achieve a change (legal effect) in the rights and duties of its author (or – albeit rarely, if not exceptionally – even those of a third party) (see also *infra*, ch 10, para 4).<sup>[4]</sup>

To put it differently, every legal subject is conferred by the law the power to produce a legal effect on her own property or her own personality

(see *infra*, ch 10, para 3), to the extent to which the law does not impose any mandatory prohibition against doing so (see also *supra*, ch 6, para 1.3; *infra*, ch 10, para 5). Such power is directed to and underpinned by **private autonomy**, the latter word stemming from ancient Greek which literally means a stipulation of rules (*νωμία*, *nomia*) by oneself (*αὐτός*, *autòs*), ie by the addressees of the rules. Therefore, a legal act in  
<sup>298</sup> the German sense of *Rechtsgeschäft* is an **act of private autonomy** (or an autonomous legal act) (see *supra*, ch 7, para 1; *infra*, ch 10, para 5). [5]

According to article II-1:102 DCFR (*Party autonomy*), '(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules. (2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided. (3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware'.

The legal effects attached to an autonomous legal act are, therefore, those that are intended by the

party/-ies performing such transaction, provided that her/their will is genuine and not affected by any factor of irrationality, like lack of judgment or discernment, mistakes, etc. (see also *infra*, ch 10, para 5). In other words, an autonomous legal act means that anyone can freely decide not only to undertake or not to undertake a certain action that is legally relevant, but also to elect the legal effects attached to it. The archetype of legal transactions are **contracts** and, to a lesser extent, **last wills (testaments)**, and marriage.

By entering into a contract, the parties intend to make some changes to their own rights and duties, and thus these changes are effected by the law. In the case of sale contract, a party acquires the ownership of a thing from the other party, and the latter receives the monetary payment of the consideration as envisaged in the contract. In principle, something similar can be held true for testaments, whereby the testator devises and bequeaths her property to a beneficiary or acknowledges a child born outside her marriage, whose family status will be therefore changed.

Hence, the legal effects of an autonomous legal act are not mainly set out by the law as such, but are rather elected by the party/-ies who entered into such transaction. When and where a property is to be transferred to a purchaser, when and

where the price is to be paid, what its amount is to be, and so on: (almost) the entirety of the legal effects produced by a contract of sale, for instance, depends on the parties' mutual consent, ie on their agreement. To put it differently, norms pertaining to contracts allow the parties to produce the very legal effects that they envisage, as far as their agreement is lawful (see *supra*, ch 6, para 1.3; *infra* ch 9, para 5).

Since the legal effects of a contract are envisaged and purported to exist by the contracting parties, they cannot be ascertained as a matter that is mandated by the law once and for all (*quaestio iuris*) but only with reference to each single contract: it is, above all, a matter of interpretation of the parties' mutual will, which may vary from one contract to another (*quaestio facti*).  
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By contrast, norms may attach legal effects to some action irrespective of any would-be intention of its author to have or not have some legal effects produced. In other words, a legal subject (see *infra*, ch 11) can freely decide whether or not to undertake certain action, but she cannot elect the legal effects attached thereto, which are stipulated by the relevant norms. In opposition to autonomous legal acts, such actions may be called heteronomous legal (or juridical, or juristic) acts.<sup>[6]</sup>

Nonetheless, legal acts of this kind produce their

own legal effects only on the condition that they have been done by their author with sufficient judgment and discernment of her own action. If this is not the case, such action does not produce the legal effects stipulated by the relevant norms, or these effects are subject to avoidance.

In most jurisdictions, for example, the author of a tort is not liable if she is a child in her ‘tender years’ or is mentally impaired in a most severe way, and other circumstances concur (see *infra*, ch 11, para 2).

However, the legal consequences of a tort are not conditional upon its author’s would-be intention to produce or not produce some legal effects.

Therefore, a tort is to be regarded as a heteronomous legal act.

Finally, some legal facts are addressed by a norm irrespective of the particular judgment or discernment of their authors, or they simply consist in natural events. They may be termed material facts.

For example, when a person dies, title to her property vests in the heirs, subject to administration. That is, the right to possession of an intestate’s property and the right to take through intestate succession accrue on the death of the ancestor, whatever event or action may have caused it – be it a murder, a heart attack, etc. In this respect, death is

regarded by the law as a material fact.

As another example. In some jurisdictions (eg article 1191 *Codice civile*), a person cannot ask for the return of payment by invoking her lack of capacity to have made it (see also *infra*, ch 11, para 2). In other terms, the obligation is discharged even if the paying debtor was underage, mentally impaired, etc. In this respect, a payment is regarded as a material fact.

Given that any occurrence may be regarded as a legal fact or as a legal act by a norm, one should point out that, despite the common parlance of lawyers, an event or action may not be properly said to be a legal fact or a legal act *per se*. It may be either the former or the latter, always and only depending on how a given norm has regard to it.

Therefore, any event or action which is regarded as an autonomous legal act by one norm may be simultaneously regarded as a heteronomous legal act by another norm, due to the relativity of legal qualifications (see *supra*, ch 9, para 1).

300 For example, a contract as such is an autonomous legal act. Therefore, if one of the contracting parties is underage, for example, she may elect to avoid the contract (see *infra*, ch 9, para 5).

Nonetheless, when a contract is concluded in order to fulfil a previous obligation to enter into it,

it is a material act as well. This means that, even when it is concluded by an underaged party, the contract discharges such an obligation (to the extent it is not avoided).

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### 3. The French bipartite taxonomy of legal facts and legal acts

The concept of autonomous legal acts and its distinction from other legal acts has not been acknowledged by all civil law jurisdictions. This lack of uniformity gives rise to considerable uncertainty within the legal terminology adopted across Europe.

The French Civil Code, in part because it was enacted in 1804 and therefore prior to the ‘invention’ of the *Rechtsgeschäfte* in German scholarship (see *supra*, ch 9, para 2), does not contain any norm mentioning autonomous legal acts as such, ie as opposed to heteronomous legal acts. Any fact that is legally relevant is, therefore, qualified as either an *acte juridique* or as a *fait juridique*.

Following the 2016 reform of the *Code civil* (see *supra*, ch 4, para 3.1.1), the division between *actes juridiques* and *faits juridiques* has been sketched by the new article 1100(1) *Code civil*, though with particular regard to the sources of obligations. That provision stipulates that: ‘*Les obligations naissent d’actes juridiques, de faits juridiques ou de l’autorité seule de la loi*’.

However, one should note that, within the *Code civil*, the category of *actes juridiques*, though it could potentially encompass all legal acts, has been *de facto* used with the meaning of autonomous legal

acts. After the above-mentioned 2016 reform, this issue has been plainly acknowledged by the French legislature, particularly in laying down the new article 1100-1: ‘*Les actes juridiques sont des manifestations de volonté destinées à produire des effets de droit. Ils peuvent être conventionnels ou unilatéraux. Ils obéissent, en tant que de raison, pour leur validité et leurs effets, aux règles qui gouvernent les contrats*’.

In a similar way, article II.-1:101(2) DCFR gives the following definition of a juridical act: ‘[a]ny statement or agreement, whether express or implied from action, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral’.

Conversely, pursuant to the new article 1100-2 *Code civil*, ‘[l]es faits juridiques sont des agissements ou des événements auxquels la loi attache des effets de droit. Les obligations qui naissent d'un fait juridique sont régies, <sup>301</sup> selon le cas, par le sous-titre relatif à la responsabilité extracontractuelle ou le sous-titre relatif aux autres sources d'obligations’. In other words, juridically significant facts (*faits juridiques*) not only comprise material facts (*des événements*) but also heteronomous legal acts (*des agissements*), because in both cases the legal effect is stipulated by the applicable norms, irrespective of any will by the author to produce it.

It is therefore not surprising that, within the French *Code civil*, torts are classified as *faits*, not as *actes juridiques*. Particularly, the very famous

general rule about liability arising from torts,  
provided for by article 1240 (former article 1382)  
*Code civil*, reads: ‘Tout fait quelconque de l’homme, qui  
cause à autrui un dommage, oblige celui par la faute  
duquel il est arrivé, à le réparer’. [7]

#### 4. The eclectic Italian taxonomy of legal facts and legal acts

In the provisions of the Italian *Codice civile*, the distinction between *fatti giuridici* and *atti giuridici* mirrors that between *faits juridiques* and *actes juridiques* in the French *Code civil*. Yet, as far as Italian scholarship is concerned, this is not an accurate account.

The *Codice civile* is French-oriented, whereas Italian scholarship is German-oriented (see also *supra*, ch 4, para 3.1.3), and it predominantly (although not unanimously) acknowledges the category of *negozi giuridici* (ie autonomous legal acts) as opposed to that of *atti giuridici in senso stretto* (ie heteronomous legal acts).

Therefore, Italian law is in this respect characterized by a mismatch between the categories acknowledged by the *Codice civile* and those acknowledged by legal scholars.

For instance, article 2043 *Codice civile* follows the French model, reading that ‘*Qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*’.

According to some legal scholars, however, the tort is an *atto giuridico in senso stretto* and not a *fatto giuridico*.

## 5. The European taxonomy and the centrality of legal acts in private law

Autonomous legal acts play a major role in private law. Undeniably, they constitute the most important category of legal facts, whose domain tends to expand also to other areas of legal systems (eg criminal and administrative law).

From the point of view of their structure, legal acts may be unilateral, bilateral, or multilateral. Legal acts are **unilateral** when they are performed by the declaration of will of one single party (eg the withdrawal from a contract); apart from some exceptions (like testaments or last wills), that declaration of will is directed to a specific addressee and carries legal effects only if and when its notice is served on the latter. Legal acts are **bilateral** when the manifestation of mutual consent of two parties is required, ie an agreement (as is the case with the majority of contracts). Legal acts may well also be **multilateral** (eg the establishment of most companies or other legal entities) (see *infra*, ch 11, para 1.2).

The subject-matter of legal acts can be **patrimonial**, thus when the interest pursued by the party or the parties may be lawfully haggled over by them, as is the case for contracts. In some legal acts, the interest can even be **non-patrimonial**, as is the case with testaments (or

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last wills) and marriage.

Traditionally, private autonomy is broadened as far as its exercise impinges upon the parties' **patrimony**, while it is shrunk by the law when its exercise impinges upon the parties' **personality**. In the latter case, it is not infrequent that the law provides for mandatory prohibitions (see *supra*, ch 6, para 1.3), since personal integrity is deemed to be worth protection even against the consent of the party concerned (for sake of her dignity as a human being).

For example, pursuant to article 5 *Codice civile*, any decision about one's own body is prohibited if it undermines her physical integrity permanently or is in any way contrary to law, to public order, or to morality.<sup>[8]</sup>

Therefore, the physical integrity of persons is protected even against their own will. No decision about it is allowed beyond the limits posed by law.

Furthermore, a legal act is usually aimed at regulating the interests of the parties while they are still alive (*inter vivos*). However, some (few) legal acts are carried out in order to make a disposition of the author's property that is to take effect after her death (*mortis causa*). The most paradigmatic among *mortis causa* acts is the testament (or last will), but within some jurisdictions it is also possible to enter into

contracts aimed at devising or bequeathing property.<sup>[9]</sup>

In the case of **illegality** of a legal act, ie when it violates or circumvents a mandatory prohibition (be it set out by a statutory provision or embedded in public policy), the act is generally affected by **invalidity**,<sup>[10]</sup> ie by a legal pathology.

A legal act may be invalid also when the will of one of the parties is somehow tainted with a deficiency of judgment or discernment. This may happen either:

- a. because one of the parties was incompetent, ie she had **no capacity to act** (see *infra*, ch 11, para 2);
- b. because one of the parties' consent was affected by a factor of irrationality (**vitiating factors**). Such vitiating factors traditionally include mistake, fraud and misrepresentation, duress and undue influence.

The invalidity of a legal act may result in its voidness (or nullity) or voidability.

In the event of **voidness (or nullity)**, a legal act is wholly or partially ineffective from the outset (*ab initio*, or *ex tunc*), regardless of whether or not any of the parties has disaffirmed it. A legal act may be void because it is illegal, or because it is affected by indefiniteness or vagueness, or because it lacks some formal requirements (like when a statutory provision requires a contract to be in writing).

A legal act's voidness can be invoked not only by any of the parties but also by a third person, whose rights might be affected by that act; it can even be raised by a court on its own motion.

These actions and defences are not subject to any statutes of repose or of limitation (see *infra*, ch 10, para 5), and a legal act's voidness cannot be validated unless differently provided for by the law.

The non-performance of any party is excused. In the event of performance, each party can claim restitution for it, even from a sub-purchaser (with certain exceptions).

By contrast, a voidable legal act is effective until its avoidance (or rescission, or annulment) occurs at the election of the aggrieved party (eg the minor), who thus holds the power-right (see *infra*, ch 10, para 4.2.1) to disaffirm such act. This power-right is time-barred, being subject to statutes of repose or to statutes of limitation (see *infra*, ch 10, para 5). In most jurisdictions, however, the aggrieved party of a voidable legal act can excuse her non-performance even where that legal act has not previously been avoided, and this defence is not time-barred.

The aggrieved party can repudiate a voidable legal act either by bringing an action before a court against the other party (in some jurisdictions) or by serving notice on the other party (in other jurisdictions).

If a voidable legal act is avoided, it is

retrospectively (*ab initio*, or *ex tunc*) reversed, and any performance is to be returned to the party who rendered it, be it the aggrieved party or another.

A voidable conveyance can vest the seller's ownership in the buyer. However, if such conveyance is avoided, the ownership is re-vested in the seller as though it had not passed to the buyer. If the seller has in the meantime transferred the possession to the buyer, the latter is furthermore obliged to return the sold thing to the former; if the buyer has paid the price to the seller, conversely, restitution of it is owed.

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**Affirmation (or confirmation, or ratification)** of a voidable legal act is generally allowed, but conditionally on the fact that the ground of avoidance has ceased to exist. It may happen through the aggrieved party's waiver of her claim to avoidance (express affirmation, or confirmation, or ratification). It may also happen through voluntary performance of the voidable contract (implied affirmation, or confirmation, or ratification).

## Glossary

## CHAPTER 10

### Rights and duties

- Legal positions and legal relations
- Freedoms (or liberties, or privileges) and licenses
- Powers (and power-rights)
- (Subjective) rights and their classification
- Relative rights (or rights *in personam*) and absolute rights (or rights *in rem*)
- Abuse of rights doctrine in civil law jurisdictions and its ‘functional equivalents’ in common law jurisdictions
- Prescription and statutes of limitations
- Statutes of repose and nonclaim statutes

Legal positions are concepts used to map what legal subjects can/may do or not do, and, conversely, what they shall/must do or not do. A legal relation is established between the holder of a position of advantage (mostly a right) and the holder of the correlative position of disadvantage (mostly a duty).

A freedom (or privilege, or liberty) is a simple position of ‘may do’ that allows a certain person, or group of certain persons, to do something or to abstain from doing something. It may amount to a liberty-right.

A power is a simple position of ‘can do’ that enables a specific person, or group of specific persons, to change either her/their own entitlements or those of someone else. If a power is granted in the holder’s own interest, it amounts to a power-right.

(Subjective) rights are characterized by the power to seek enforcement. They may be patrimonial or non-patrimonial (or extra-patrimonial), relative (*in personam*) or absolute (*in rem*). They are relative (like credits and

power-rights) when they can be enforced only against a specific person or group of specific persons; they are absolute (like real rights and rights of personality) when they can be enforced against anyone else who interferes with the possession of an entitlement.<sup>308</sup>

The civilian tradition historically acknowledged a general principle that forbids abuse of rights, which has eventually settled in EU law as well. Although that general principle is traditionally strange to common law jurisdictions, the latter are acquainted with a number of (mostly equitable) remedies that work as ‘functional equivalents’ to the civilian prohibition.

With the possible exception of property, patrimonial rights are time-barred. If these rights are infringed, their holder must seek a timely redress, unless they become unenforceable (prescription, or statutes of limitations).

Some statutory provisions put a time bar on rights irrespectively of any possible infringement of them, or they put a time bar on any prospective litigation (statutes of response and nonclaim statutes).

## 307 1. Legal positions and legal relations

As is the case with legal facts and acts (see *supra*, ch 9, para 1), legal positions are concepts deployed in legal discourse to epitomize unitary bodies of principles and rules. The main legal positions (like property or obligations) thus

amount to legal institutes, which streamline the boundaries and the content of entire branches of the legal system (like the law of property, or that of obligations).

In the parlance of civil lawyers, legal positions are usually qualified as ‘subjective’, because they are to be predicated on a specific person or group of specific persons (see also *infra*, ch 10, para 4).

While the scope of legal facts and legal acts clings to natural events and human actions, in fact, the scope of legal positions clings to relations between legal subjects. Instead of dealing with legal positions as such, therefore, part of civil law scholarship, particularly in Germany, prefers to focus primarily on legal relations, each of them being conceptualized as a complex and unitary whole of legal positions (see also *infra*, ch 10, para 4.2.1).<sup>[1]</sup> Nevertheless, the analysis of the different kinds of rights, ie the most significant legal positions (see *infra*, ch 10, para 4), was developed already by the Pandectists of the late nineteenth century (see *supra*, ch 4, para 3.1.2).

In Anglo-American legal systems, it may be said that ‘remedies precede rights’.<sup>[2]</sup> Due to the origins of the English legal system (see *supra*, ch 2, para 4.2), the discourse of common lawyers has been traditionally centered on actions, ie suits brought in a court, more than on rights; therefore, it is the procedural, not the substantive, layer of the common law that has come to the forefront of Anglo-American jurisprudence.

A (judicial) **remedy** is a response to a ‘cause of action’ (like breach of contract, tort, etc.).<sup>[3]</sup>

A path-breaking article published in the 1910s by **Wesley Newcomb Hohfeld** (1879-1918), however, proved seminal and paved the way for a thriving body of literature on legal positions,<sup>[4]</sup> which straddles jurisprudence and legal philosophy. Hohfeld’s analytical scheme is the upshot of a definitional, or stipulative, approach, which is aimed at introducing more precise and rigorous patterns of legal discourse, particularly with regard to judicial litigation; this feature may explain why his teachings gained a considerable consensus among the representatives of legal realism (see *supra*, ch 7, para 4).<sup>[5]</sup>

Any legal relation is based on the **entitlement** of a specific person or group of specific persons, which is therefore in a legal position of ‘can/may do’ or ‘not do’ something, against another specific person or group of persons, which is therefore in a position of ‘shall/must do’ or ‘not do’ something; for example, the creditor can claim the sum of money that is owed to her by the debtor, and a proprietor can keep a trespasser off her plot of land. The **substance (or the content)** of the legal relation between the two counterparts consists in a given action or state of affairs;<sup>[6]</sup> for example, the payment that is owed by the debtor, or the enjoyment of the plot of land that is owned by the proprietor.

Within each legal relation, a position of **advantage** entails a matching position of **disadvantage**. In other terms, a legal relation is structured as a pair (or dyad) of **correlative legal positions**, one of ‘can/may do’ or ‘not do’, and the other of ‘shall/must do’ or ‘not do’ something. Mostly, a right of someone relates to the conduct of another, who thus bears a correlative duty (see *infra*, ch 10, para 4).

For example, a right of credit is a legal position of ‘can do’, which entitles its holder to claim performance from someone else. Conversely, this very ‘someone else’ holds a correlative legal position of ‘shall do’, ie the debt, which obliges her to render that performance in the interest of the creditor (see *infra*, ch 10, para 4.2.1).

Therefore, credit and debt are counterparts, and the legal relation between the holder of the former (ie the creditor) and that of the latter (ie the debtor) is termed an **obligation** (see *infra*, ch 10, para 4.2.1).

<sup>310</sup> Following the conceptual framework set out by Hohfeld, it is commonly argued that two legal positions may be not only correlatives (when they entail each other) but also **contradictries** or **opposites** (when they negate each other). [7] For example, ‘power’ negates ‘disability’ and, albeit only to a certain extent, ‘duty’ does so with

'liberty' (see *infra*, ch 10, paras 2-3). Logically admissible as it may be, however, the simultaneous holding of contradictory legal positions is usually not tolerated by legal systems.

Furthermore, a distinction may be drawn between **first-order relations**, which apply directly to people's conduct and social intercourse, and **second-order relations**, which apply directly to people's entitlements and only indirectly (but crucially) to people's conduct and social intercourse.<sup>[8]</sup> Most typically, a right is an entitlement establishing a first-order relation (since it demands that someone else does something or abstains from interfering with something),<sup>[9]</sup> whereas a power pertains to a second-order relation (since its exertion effects a transfer of entitlement to someone else).

To put it differently, the conceptualization of legal positions is finally centered on rights, since they represent the entitlements that prompt any legal relation (see *infra*, ch 10, para 4). The other legal positions that are usually conceptualized by legal theory are either counterparts or components of rights, but they hardly attain a considerable degree of self-being. In that sense, they can be qualified as **ancillary** to rights.

## 2. Simple positions of ‘may do’: freedoms (or privileges or liberties)

A freedom (or privilege or liberty) is a position of ‘may do’ that allows a certain person, or group of certain persons, to do something or to abstain from doing something.<sup>[10]</sup> More precisely, having a liberty to engage in a certain action means to be free from any duty to eschew that action, and having a liberty to abstain from a certain action means to be free from any duty to undertake that action.<sup>[11]</sup> The counterperson or group of counterpersons is said to have a **no-right** of halting the activity or state of affairs to which the freedom itself pertains.<sup>[12]</sup>

The owner of a plot of land holds the freedom to enter on it (she may do that), no matter how insistently her neighbor demands that she stays away. A trespasser does not enjoy such privilege (she has no right to enter on someone else’s plot of land and, if she does so, she commits a wrong).

If considered on its own, a freedom does not entail any right or power.<sup>[13]</sup> In principle, therefore, the person or group of persons that has a correlative no-right may well have the **liberty to interfere** with the actions or the states of affairs concerned by the liberty of her/its counterpart, by making recourse (not to mechanisms of public

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governance but) to her/its own devices.<sup>[14]</sup>

For example, freedom of speech as such does not confer the power as well to seek enforcement, not being a right (see *infra*, ch 10, para 4). Therefore, people can permissibly do their utmost to interfere with someone else's voicing of opinions (eg by making so much noise that the former's words are drowned out).<sup>[15]</sup>

However, it must be pointed out that (human) rights in most cases shield the halting of the action or state of affairs concerned by a liberty, albeit sometimes imperfectly.<sup>[16]</sup>

For example, one who seeks to interfere with someone else's freedom to speech cannot do so by physically assaulting the latter while talking, since she is protected by her right to be free from physical assaults.<sup>[17]</sup>

Even more importantly, freedoms are generally accompanied by a corona of cognate rights that are purported to protect their exercise,<sup>[18]</sup> so that they are eventually reducible to those very rights (**liberty-rights**).<sup>[19]</sup>

For example, in most legal systems fundamental economic freedoms are flanked by some duties of the competitors to refrain from distortion of fair competition.<sup>[20]</sup>

Be it as it may, it is safe to say that most freedoms end up being ancillary to rights and sometimes are not even acknowledged as autonomous legal positions.

Although embodied in a right, however, specific freedoms can be restricted under the force of an agreement entered into by the rightsholder.

For example, if a plot of land is sold under a condition of its inalienability (no-sell term), the buyer may not convey it to another (she may not do so) (see also *infra*, ch 10, para 3).

A specific privilege may be voluntarily vested in someone else through a license (leave, permission).

The owner of a plot of land can grant someone else the leave or license to enter on it. Both the owner and the licensee may do that (unless the former voluntary obliges herself not to do it).

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### 3. Simple positions of 'can do': powers (and power-rights)

A power enables a specific person, or group of specific persons, to expand or reduce or otherwise modify, in particular ways, his/her own

entitlements or those of another.<sup>[21]</sup> In other terms, a power consists of an ability to effect changes in legal relations, either by means of a legal act intending those changes, or (but less frequently) by means of a lawsuit (see supra, ch 9 , paras 2-5).<sup>[22]</sup>

In some cases, the entitlement susceptible to being thus changed is held by the powerholder

herself.<sup>[23]</sup>

For example, the power of assigning a credit or conveying a plot of land is generally held by, respectively, the holders of the credit and of the property, who, for example, can sell or donate their own rights.

In other cases, the entitlement susceptible to being changed by a powerholder is held by someone else, who is then said to bear a liability , i.e. an exposure to the imposition of such changes. In fact, a liability-bearer is unshielded from the bringing about of changes in her entitlements by the exertion of someone else's power.

The power to change someone else's entitlements may arise either from the command of the law or

from a previous legal act of the liability-bearer herself, which is termed **authorization**.

In most cases, a power to change someone else's entitlements is directed at preserving an interest of the liability-bearer.

For example, **agency** is the power (of the agent) to act on behalf of someone else (the principal) and to perform some legal acts in the latter's name (bar those acts which are strictly personal, like marriage and testament).<sup>[24]</sup>

In some other cases, a power is directed at preserving an interest of the powerholder herself; if that is the case, it amounts to a right, which is termed a **power-right** (see *infra*, ch 10, para 4.2.1).

For example, 'the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason', and without incurring any costs other than those necessary to return

<sup>313</sup> the merchandise.<sup>[25]</sup> If, before the expiry of the **withdrawal** period, the consumer notifies the trader of her decision to withdraw from the contract, the rights and duties of both contracting parties are terminated. Particularly, the consumer's unilateral choice of withdrawal will terminate not only

her own contractual rights and duties but also those of the trader (like that of claiming the agreed price).

Notably, a power is not always accompanied by the liberty to exercise it. The holder can exercise her power while being under a duty not to do so; the violation of this duty can incur a penalty without nullifying the exercise of the power.<sup>[26]</sup>

For example, the no-sell term of a contract of tenancy (see *infra*, ch 10, para 4.2.2) obliges the owner of a plot of land not to sell it (unless to the tenant) (see *supra*, ch 10, para 2). While bearing this contractual obligation, the owner is not deprived of the power to convey her property to someone else. Therefore, if she happens to convey her plot of land to a third person, the latter acquires her ownership despite the breach of that contractual obligation; conversely, she may be held liable for damages towards the tenant.

In turn, a duty can bind a powerholder to exercise her power.

For example, a legal monopolist or an enterprise operating in a regulated market may be required by a statutory provision to enter into a contract for the supply of the goods or services it provides to the public.

Yet, it is nowadays generally acknowledged that any private power has to be exercised according to the general principle of good faith (see *supra*, ch 4, para 1; ch 6, para 3; ch 8, para 1.2); conversely, one who is exposed to the exercise of a power is deemed to be vested with a legitimate interest in being protected against an abusive imposition by the powerholder ( abuse of power ).

The legal position which denies a liability is

termed immunity.<sup>[27]</sup> The holder of an immunity is not exposed to the exercise of a power by someone, with respect to any entitlements covered by the immunity. Correlatively, one who is devoid of that power is said to bear a disability ,

i.e. the absence of a power.<sup>[28]</sup>

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## 4. (Subjective) rights

A (subjective) right is a complex legal position that consists of an aggregate of freedoms, claims, powers, and immunities,<sup>[29]</sup> whose backbone is the power to seek enforcement through mobilization of the state's coercion, if necessary.<sup>[30]</sup>

The qualification of rights as 'subjective' (see also *supra*, ch 10, para 1) is characteristic of civil lawyers' parlance and is due to the fact that Romance as well as Germanic languages use one single term (*droit*, *right*, *derecho*, *direito*, *Recht*) to denote both a right, i.e. a kind of legal position, and the law, i.e. the system of legal principles and rules (see *supra*, ch 6, para 2). Therefore, it is rather customary to indicate in context whether it is talked of *droit*, *Diritti*, *derecho*, *direito*, *Recht* in a subjective sense (ie a right) or in an objective sense (ie the law).<sup>[31]</sup> In English language, by contrast, the term 'right' does not coincide with that of 'law', so that there is no risk of confusion between the two concepts thus denoted (see *supra*, ch 2, para 1). Since embryos and fetuses are not recognized as legal persons (see *infra*, ch 11, para 1.1), the rights they

are nevertheless vested in by the law  
are sometimes depicted as  
(temporarily) 'non-subjective'  
rights .<sup>[32]</sup>

The perimeter of this complex of positions of 'may do' and 'can do' changes from one kind of right to another: some rights (that of property, above all) encompass a large number of freedoms, powers, and immunities, whereas some others encompass only very few of them. Despite their variability, rights share a minimum commonality: they are enforceable through the legal system.

For example, if a debtor fails to perform his obligation, the creditor can mobilize a state's officials, who will seize and auction off the debtor's property, so that the proceeds may be handed over to the creditor. On the basis of the various sets of norms, of both a substantive and procedural nature, that govern this proceeding, it can be safely said that the creditor has a power to seek enforcement of her credit and, therefore, the latter amounts to a right .

Most rights are centered on a claim , which affords to a specific person, or a group of specific persons, legal protection against someone else's interference or against someone else's withholding of assistance or remuneration, in regard to a certain action or a certain state of

affairs.<sup>[33]</sup> The specific person or group of specific persons that is required to abstain from interference or to render assistance or

<sup>315</sup> remuneration is under a **duty** to do so.<sup>[34]</sup>

A duty to do something does not force involves a liberty to do that thing, particularly since a person may be under **contrary duties**. In fact, it may happen that a duty to do something coexists with a duty to refrain from doing the same thing.<sup>[35]</sup>

For example, a restrictive covenant can bind the covenantor not to convey her plot of land to others. If the covenantor enters into a contract of sale in spite of the covenant, however, she is obliged to convey her property to the buyer (assuming that she is a different person than the covenantee). The duty arising from the restrictive covenant thus collides with that arising from the subsequent contract of sale. As a result, the covenant owes the conveyance of her property to the buyer, but at the same time she is not allowed by the law to do so. If the covenant performs her duty towards the buyer, she breaches the restrictive covenant, and vice versa.

Furthermore, **conflicting rights** are possible, ie rights to inconsistent states of affairs.<sup>[36]</sup>

For example, in some civil law jurisdictions the owner of a chattel or of a plot of land can vest his property in several buyers or promises, thus engendering a conflict between their rights. The conflict is generally resolved by the law in favor of the first who gains the possession of the chattel or who provides for land registration, respectively.

#### 4.1. Will theory (or choice theory) vs interest theory (or benefit theory)

The relationship between the holding of a right and that of the power to seek its enforcement has historically represented a bone of contention among scholars. The seeds of this theoretical dispute, which is still bubbling in contemporary Anglo-American literature, may be traced back to the German Pandectistic School of the late nineteenth century (see *supra*, ch 4, para 3.1.2).

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The first fully fledged theoretical conception of rights was fathered by **Friedrich Carl von Savigny** (see *supra*, ch 4, para 3.1.2), and it was instrumental in securing a territory where the individual could enjoy her freedom of self-determination. Being tightly hinged on the procedural backbone of Roman law, Savigny's theory depicted a right as an action (*Klage*), which was to be brought against someone else in

316 court. [<sup>38</sup>]

It was disputed by **Bernhard Windscheid** (see *supra*, ch 4, para 3.1.2), however, that such doctrine was appropriate for Roman law but not for modern law. [<sup>39</sup>] In fact, he argued, the former was 'not a law of rights, but a law of actions to be brought about at courts'; [<sup>40</sup>] for Roman lawyers, in fact, 'actions were not a derivative, but a primary

and autonomous concept'.<sup>[41]</sup> Under modern law, by contrast, this understanding would prove untenable, since procedural law would now be

'the servant of private law'.<sup>[42]</sup> In order to shift the discourse from substantive to procedural law, Windscheid centered the definition of rights on the concept of a claim (*Anspruch*),<sup>[43]</sup> which he initially described as 'the device guaranteeing the will of individuals as legal subjects';<sup>[44]</sup> later on, after falling under the influence of August Thon's teachings (1839-1912),<sup>[45]</sup> Windscheid depicted a right as 'the will-power granted by the legal system to an individual'.<sup>[46]</sup> This doctrine may be termed the **will theory (or choice theory) of rights**.

Although such a view was followed by the majority of Pandectists,<sup>[47]</sup> it was opposed by Rudolf von Jhering (see *supra*, ch 4, para 3.1.2), who advocated for a functionalistic rather than a voluntaristic conception of rights. He therefore defined a right as an 'interest enforceable at law'.<sup>[48]</sup> This doctrine may be termed the **interest theory (or benefit theory) of rights**.

Both theories agree on the point that any right must be enforceable, ie accompanied by the power to seek enforcement.<sup>[49]</sup> They are divergent, however, insofar as they touch upon the precise location of that power, which actually

may not always be held by the claimholder but also by someone else.

If the power to seek enforcement does not lie within the discretion of the person who has the claim, the will theory (or choice theory) opines that that claim does not amount to a proper right. In other terms, this doctrine contends that what is sufficient and necessary for someone's holding of a right is that she is competent and authorized to demand or waive the enforcement of that right.

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By contrast, the interest theory (or benefit theory) argues that a right is unaffected by the precise location of the power to seek enforcement.

To a certain extent, however, the two theories prove to be complementary. Particularly, will theory (or choice theory) accounts for the structural component of rights (which is hinged on the power of enforcement of the rightsholder), and interest theory (or benefit theory) accounts for their functional component (which consists in preserving the vested interest of the rightsholder).

To sum up, a right may be depicted as the power of a person or group of persons to seek enforcement for the preservation of his/her vested interest.

## 4.2. Classifications of rights

Some rights are **patrimonial**, some others are **non-patrimonial (or extra-patrimonial)**, depending on whether or not they purport to preserve an interest that the rightsholder may lawfully haggle over.

For example, property is a patrimonial right, the right to life is non-patrimonial.

The right to receive alimony or spousal support, despite appearances, is non-patrimonial, because it is awarded for the needs and future maintenance of the recipient spouse.

Patrimonial rights can generally be assigned or waived by their holder (whether in exchange for a consideration or gratuitously); by contrast, the **assignment or waiver** of a non-patrimonial right is generally not permitted by the law.

For example, the right to receive alimony or spousal support is non-assignable, at least with regard to alimony not yet accrued.<sup>[51]</sup>

However, one can consent to the use of some personality rights (like that of image) to someone else, albeit either temporarily or with the right of withdrawal from that consent;<sup>[52]</sup> therefore, some

specific aspects of personality can be licensed (and merchandized) as though they were intangibles.

Patrimonial rights that are alienable are generally also inheritable: at the death of their holder, therefore, they descend to the latter's heirs.

**Alienability and inheritability**, however, are distinct characteristics of rights, which, though commonly concomitant, are not necessarily coexistent.

For example, the right of usufruct (see *infra*, ch 10, para 4.2.2), though assignable under certain conditions, terminates at the holder's death.

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Non-patrimonial rights, by their nature, do not pass but rather terminate at their holder's death; the same applies to those patrimonial rights that are not alienable.

For example, human rights are neither assignable nor inheritable.

The same applies to the right to receive alimony or spousal support, at least with regard to alimony not yet accrued.

On the basis of Roman law, rights have traditionally been divided into two categories: **relative rights** (*in personam*) and **absolute rights** (*in rem*). The former can be enforced only against a particular person or group of particular persons (see *infra*, ch 10, para 4.2.1); the latter

can be enforced against whoever interferes with the rightsholder's possession of an entitlement (see *infra*, ch 10, para 4.2.2). The distinction is well settled also in common law systems, where, however, it does not regard substantive rights as such but the actions that can be brought to enforce them (see also *supra*, ch 10, para 1).<sup>53</sup>

#### 4.2.1. Relative rights (or rights *in personam*)

A right is qualified as relative (or *in personam*) when the action to enforce it can be brought only against one who holds the correlative position of disadvantage, be it a specific person or a group of specific persons.

The credit is typically a relative right. If A holds a credit for a sum of money, it means that B, or C, or both of them owe(s) her that money, and nobody else. Obviously, A can claim her money only from B, or C, or either of them, but not from D or anyone else.

Patrimonial rights *in personam* are credits and power-rights. In common law legal systems, the actions for the recovery of personal property are personal as well.

Someone who holds a credit (the creditor) is entitled to claim that another person or group of persons (the debtor/-s), who owe/-s the correlative debt, perform/-s an action or an abstention in her interest. The performance owed

by the debtor must be of economic nature and, according to a classification stemming from Roman law, can consist in giving something (*dare*), doing something (*facere*), or abstaining from doing something (*non facere*). The legal relationship between the creditor and the debtor is called an obligation.

An obligation may arise from a contract, from a tort, or from an instance of unjustified enrichment (**sources of obligations**). Actions on contract (*ex contractu*), ie for the enforcement of a contract or to redress its breach, and actions in tort (*ex delicto*), ie for the recovery of damages caused by an injury to person or property, are therefore relative; consequently, judgments on them will impose solely a personal liability or obligation and do not affect the parties' interest in property (see also *infra*, ch 10, para 4.2.2).

Credits are legal positions that are not final, but which are instrumental to the debtor's performance. Once the debtor has discharged her duty, or the creditor's interest has been otherwise somehow achieved, the correlative credit terminates. For this reason, the assumption that credits are rights has been challenged by some scholars.

Be that as it may, it can be safely assumed that the law applicable to credits is purported to facilitate and accelerate the achievement of the creditor's interest and therefore the termination of her right, particularly through the performance of the

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debtor's duty.

Following the teachings of Claus-Wilhelm Canaris, which conversely rest on the earlier theories of the latter's mentor Karl Larenz (1903-1993), German scholarship has conceptualized obligations as complex legal relations, in which the correlative positions of credit and debt are surrounded by a vast **bundle of complementary and supplementary duties** imposed upon both parties. These duties are to be drawn from the general principle of good faith.

A **power-right** enables its holder to change someone else's entitlements.<sup>[54]</sup> The peculiarity of this sort of rights is that the other party's correlative position is (not a duty but) a **liability** (see *supra*, ch 10, para 3).

The category of power-rights was created by German scholars. Particularly, Ernst Zitelmann (1852-1923), taking as his starting point the right to withdraw from a contract, identified the '*Rechte des rechtlichen Könnens*'.<sup>[55]</sup> Later on, Konrad Hellwig (1853-1916) redefined the concept as *Gestaltungsrechte*,<sup>[56]</sup> and finally Hemil Seckel (1864-1924) once again and definitively forged the notion of power-rights.<sup>[57]</sup> Italian scholarship – especially that of Giuseppe Messina (1877-1946) – also played a crucial role in streamlining the concept of power-rights.<sup>[58]</sup>

Most power-rights can be used by their holder through a unilateral legal act (see *supra*, ch 9, para 5), whose notice has to be served on the liability-bearer and which, once served, cannot be withdrawn.<sup>[59]</sup> Some other power-rights, however, can be used only insofar as the rightsholder files a lawsuit.<sup>[60]</sup>

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For example, under certain conditions, one who has entered a contract by mistake holds a power-right to avoid it. In some jurisdictions, that contract is avoided by the innocent party's serving notice on the other party of a declaration; in some other jurisdictions, by the innocent party's bringing an action before a court against the other party (see *supra*, ch 9, para 5).

Power-rights as such cannot be generally assigned to someone else.<sup>[61]</sup>

In common law legal systems, property in everything movable (like goods, chattels and money, as well as notes, bonds and stocks) can be recovered by the owner only by bringing a relative action (*in personam*):<sup>[62]</sup> in this sense, it is called **personal property** (see also *infra*, ch 10, para 4.2.2).<sup>[63]</sup>

Non-patrimonial rights *in personam* are mostly established between the members of a family. Of particular importance are the rights and the duties between spouses, as well as between

parents and (minor) children.

#### 4.2.2. Absolute rights (or rights *in rem*)

A right is qualified as absolute (or *in rem*) when the action to enforce it can be brought against whoever interferes with the rightsholder's possession of an entitlement. In other terms, an absolute right is accompanied by the **power of its holder to exclude everyone else from interfering with its use (*ius excludendi alios*)**.

In this sense, an absolute right may be said to be held '**against the world**', or '**against all the others**' (*erga omnes*), since anyone (with the exception of the rightsholder) can be brought within the sway of the duty of non-interference that is correlative to that right.

This definition seems to challenge, however, the very concept of rights as engendering legal relations between two particular persons or groups of particular persons (see *supra*, ch 10, para 1). In order to square absolute rights with legal relations between two specific persons or groups of specific persons, therefore, it has been suggested that an absolute right really consists of a **set of indefinitely numerous rights**, each of which would be held against a specific person. Insofar, they have been defined as **multital rights**, opposed to **paucital rights** like those that are relative.

In the event of interference with the entitlement

of the rightsholder, the latter can institute a real action to determine the status of things and the rights of individuals with respect thereto.

In **civil law systems**, property in everything tangible, be it movable or immovable, is a right that is absolute and that may be described as an exclusive and potentially unrestricted right to a thing, implying the power to dispose of it in any way and the liberty to use it: it therefore encompasses the complete array of ‘can do’ positions that can be privately owned. Given that the Latin for ‘thing’ was *res*, property is therefore classified as a **real right**, in the sense of a right having a thing as its object.

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Furthermore, civil law systems traditionally acknowledge a limited number (*numerus clausus*) of real rights other than property:<sup>[64]</sup> they share the characteristic of being absolute rights encumbering a tangible whose property is owned by someone else (ie the proprietor). Therefore, they are traditionally called **real rights in someone else’s property**, a name stemming from Latin *iura in re aliena*. In most cases, it is the proprietor herself that conveys those rights to one other, who thus acquires their ownership; sometimes, however, they are imposed by statutory provisions, be it automatically or through a judicial decision.

Real rights in someone else’s property run with the latter (*ius sequendi*), ie they encumber property also against any successor of the proprietor

(whether a purchaser or an heir); if they are in immovables, however, they must be generally recorded, or registered, at that end.

The real rights in someone else's property are usually subdivided into two subsets: possession rights and security rights.

Possession rights in someone else's property are those of usufruct and of servitude.

**Usufruct** is a real right to use a thing belonging to someone else and to enjoy its fruits, the usufructuary being conversely obliged to preserve the substance of that thing for the property owner of it.

**Servitudes** are real rights that are held by the proprietor of a land (called the 'dominant estate') and encumber another's adjacent land (called the 'servient estate'). These rights may consist in a liberty, privilege, or advantage that the owner of the dominant estate can use on the servient estate: for example, a right of way (ie of passage on a strip of the servient estate).

Security rights in someone else's property are those of pledge and of hypothec.

A **pledge** is a lien on movables that are delivered as security for the payment of the debt owed either by the pledgor or by a third person; the pledgee acquires a right of possession on the pledged chattel

and, in the event the debt owed to her is not payed, she can sell it without the aid of a court.

A **hypothec** is a lien on immovables that are conveyed (and recorded or registered) as security for the payment of a debt owed either by the mortgagor or by a third person; the mortgagee acquires no right of possession or control on the hypothecated immovable, but, in the event the debt owed to her remains unpaid, she can sell it on foreclosure.

In **civil law systems**, therefore, property and the other real rights, be they in movables or in immovables, can be recovered against anyone who unlawfully detains the thing or otherwise interferes unlawfully with its possession, since they are absolute rights. Something similar applies to **intellectual property** (in copyright) and **industrial property** (in trademarks, patents, and the like).

In **common law systems**, by contrast, property in movables is personal (see *supra ch 10, para 4.2.1*): therefore, it can be recovered only by bringing a relative action (*in personam*), ie only from one who committed a tort against its owner or who has privity of contract with the latter. Property in immovables ('lands, entitlements, hereditaments'), by contrast, is treated as **real property**, which the owner can recover by bringing an absolute action (*in rem*) against

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whoever else.<sup>[65]</sup> The interest in immovable comparable to civil law property is called a **fee simple, or absolute fee**, which is the broadest freehold estate. However, it may be encumbered through someone else's interests in real property, which can be recovered by bringing an absolute action as well.

Interests in someone else's immovables are those of **usufruct, easements** (as well as **profits, or profits à prendre**) and **mortgage**. They all present traits comparable to those of their civil law equivalents.

A **leasehold estate** is an interest in full possession of real property, which the landlord conveys to the tenant for a consideration, usually the payment of rent. It is thus created privation of property, as well as privation of contract between the lessor and the lessee.

Absolute non-patrimonial rights *in rem* are the **rights of personality** (see also *supra*, ch 10, para 4.2),<sup>[66]</sup> which can be classified in the broader genus of **human rights**. Among the rights of personality, particularly noteworthy are those to privacy, image, likeness, and name.

## 5. Delayed exercise of rights

For a number of reasons, the law subjects the exercise of rights to several constraints of time, both on the substantive level (ie the legal relations with the holder of the correlative position of ‘shall/must do’ or ‘not do’) and on the procedural level (ie the lawsuits and the proceedings thus taken).

In the field of private law, the most important time constraints on the exercise of rights are: first, prescription and statutes of limitations (see *infra*, ch 10, para 5.1); secondly, statutes of repose and nonclaim statutes (see *infra*, ch 10, para 5.2).

Other time constraints are overwhelmingly of procedural character and, also for this reason, will not be expanded upon in this book.

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## 5.1. Prescription and statutes of limitations

In civil law systems, most patrimonial rights (safe property) have to be enforced within certain time periods, which are set out by the law: when those time periods run out, the rights that have not been pursued become unenforceable (prescription). In common law systems such time-based limitations of enforcement of rights do not belong to the common law, but are set out through apposite statutory provisions (statutes of limitations);<sup>[123]</sup> they do not affect substantial rights as such, be they absolute or relative, but the actions to enforce them, and they are therefore considered a procedural mechanism.<sup>[124]</sup>

In civil law systems, the bulk of the provisions on prescription is set out by civil codes, although special provisions are not rarely contained in other pieces of legislation. Remarkably, at the outset of the new millennium, first the BGB and then the *Code civile* have been intensively reformed as to prescription and brought in line with European law, particularly as provided for by the PECL (see *supra*, ch 8, para 2.2).<sup>[125]</sup>

In Germany, the provisions on prescription set forth by the BGB were rewritten on occasion of the grand reform of the law of obligation enacted in 2001 (*Modernisierung des Schuldrechts*),<sup>[126]</sup> and they were

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subsequently adjusted through a piece of legislation enacted in 2004 (*Gesetz zur Anpassung von Verjährungsvorschriften an das Gesetz zur Modernisierung des Schuldrechts*) (see *supra*, ch 4, para 3.1.2). Moreover, they were amended again in 2008 with regard to the contract of insurance (*Versicherungsvertragsgesetz*).

In France, the *Code civil*'s provisions on prescription were amended in 2008,<sup>[127]</sup> and rewritten again in the framework of the overall reform of the law of contract and obligations that was passed between 2016 and 2018 (see *supra*, ch 4, para 3.1.1).

In Italy, the civil code provisions have thus far not been reformed as a whole;<sup>[128]</sup> however, some proposals have recently begun to be discussed.  
<sup>[129]</sup>

In common law systems, the UK enacted the Limitation Act 1964, which was subsequently amended and eventually replaced by the Limitation Act 1980.<sup>[130]</sup> In the US, statutes of limitations may be set out both in federal and in state legislation.<sup>[131]</sup>

The objective of prescription may be acknowledged in finality, certainty, and predictability of legal positions of disadvantage, above all of duties.<sup>[132]</sup> Lawsuits are time-barred, particularly, because such limitation ensures that

the search for the truth is not impaired by stale evidence or loss of evidence.<sup>[133]</sup>

Non-patrimonial rights are generally not subject to prescription, be they absolute (personality rights) (see *supra*, ch 10, para 4.2.2) or relative (like the right to receive alimony or spousal support, until they are accrued) (see *supra*, ch 10, para 4.2.1).<sup>[134]</sup> In civil law systems, property is not time-limited as well;<sup>[135]</sup> however, if someone else takes possession that is adverse to the proprietor and, without interruption by the latter, that possession continues for the time period set out by the law, the former proprietor's ownership is subject to forfeiture, and the former possessor may thus become the new owner of property or of a real right of possession, like that of usufruct or of servitude (acquisitive prescription).<sup>[136]</sup>

<sup>331</sup> Under German law, it is explicitly set forth that it is claims (*Ansprüche*) that are subject to time limitation (§ 194(2) BGB),<sup>[137]</sup> according to Windscheid's theory on rights (see *supra*, ch 10, para 4.1). Differently than under French law and Italian law,<sup>[138]</sup> this provision implies that, on one hand, not only property but also real rights in someone else's property are not time-barred; on the other hand, that all claims for the recovery of property (and of other real rights) are subject to time limitations (§ 197(1)(3) BGB).<sup>[139]</sup>

Prescription cannot be raised by courts on their own motion but is to be pleaded as an **affirmative defense** by one who is sued by the rightsholder; [140] if she does not assert it promptly, in most legal systems prescription is subject to forfeiture.

[141] Furthermore, the defendant is prevented from invoking prescription when she has misrepresented the truth or otherwise behaved dishonestly towards the rightsholder, particularly by unduly delaying the latter's commencement of an action.

In **civil law jurisdictions**, such conduct or misrepresentation detrimental to the rightsholder may be considered abusive (see *supra*, ch 10, para 4.3), insofar as it infringes the principle of good faith. [142] This is the case when the rightsholder is induced in error as to the length of prescription, [143] or she is otherwise prevented from a timely lawsuit.

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In **common law jurisdictions**, similar responses are construed on the basis of the doctrine of estoppel (see *supra*, ch 10, para 4.3). [145] In these sort of cases, UK law extends the limitation period through statutory provisions (see also *infra*, ch 10, para 5.1). [146]

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Prescription can be waived but not for the future.

[147] At any rate, the debtor who, despite prescription of the creditor's right, freely

discharges her obligation, cannot subsequently seek restitution of such payment. [148]

The length of the limitation period is specifically set out though the relevant statutory provisions and may vary for each type of right. By and large, time limits set out for real rights (or actions to enforce them) are considerably longer than those set out for obligations.

Civil codes generally set forth an ‘ordinary’ time limit, [149] which is to apply to any right, unless otherwise settled in specific provisions of the codes themselves or in other pieces of legislations.

Albeit with some restrictions (for example, for purposes of consumer protection), in most legal systems the parties to a legal relation can agree to shorten or to lengthen the limitation period in a reasonable manner, as well as to derogate from the norms on its suspension and interruption as set out in statutory provisions. [150]

The limitation period begins to run from the day when (*dies a quo*) an issue of enforcement of the relevant right arises, [151] because either the correlative duty is infringed by the counterparty (eg breach of contract) or someone else interferes with the enjoyment of that right (eg adverse possession).

In common law jurisdictions, it is held that the limitation period begins to run only when a plaintiff knows, or should know through the exercise of due diligence, that a cause of action

might exist; in other terms, the start of that period is postponed until the plaintiff discovers, or has reason to discover, the cause of action (**discovery rule**). [152] By contrast, the civilian tradition has traditionally held that, even if excusable, the **ignorance of the rightsholder** that a cause of action had accrued cannot generally delay the running of prescription; this rule, however, has been increasingly challenged by courts, particularly with regard to litigation for malpractice by doctors or, to a lesser extent, by other professionals (like notaries public). Since 2000, furthermore, an increasing number of civil code provisions began to stipulate that, at least when the time period set out by the law is short, the running of prescription is conditional upon the awareness of the rightsholder that her right was breached or she was the victim of a tort. In case such awareness is lacking, prescription runs all the same, but a longer time period is set out by the law. [153]

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Prescription is subject to **tolling** when a statutory provision stipulates that, for some reason, its start is delayed until some event takes place or that its running is suspended (**extension of period**). [154] When prescription undergoes **interruption**, instead, the time period starts running anew (**renewal of period**).

For example, prescription is generally tolled in a case of minority or mental illness of the rightsholder, until she attains (again) her capacity

to act,<sup>[155]</sup> or a legal representative is appointed to act on her behalf (see *infra*, ch 11, para 2.1);<sup>[156]</sup> similarly, it does not run against a decedent until the appointment of her administrator or the acceptance of the succession by the heirs;<sup>[157]</sup> neither does it run where the existence of a right has been fraudulently concealed.<sup>[158]</sup>

Prescription is tolled also between spouses or between parents and children;<sup>[159]</sup> the same applies insofar as negotiations or mediation are ongoing between the parties,<sup>[160]</sup> or during the litigation or arbitration proceeding taken by the rightsholders.<sup>[161]</sup>

Prescription is **interrupted** when the rightsholder claims for enforcement of her right,<sup>[162]</sup> or when the counterparty acknowledges that right.<sup>[163]</sup>

Under French law, the reforms of 2008 and 2016 set forth that, despite any suspension or interruption, prescription cannot generally exceed twenty years from the birth of a right (so-called *délai butoir*),<sup>[164]</sup> unless differently settled.

## 5.2. Statutes of repose and nonclaim statutes

Statutes of repose extinguish a right because of its prolonged non-use, whether or not an issue of enforcement has arisen in the meanwhile.<sup>[165]</sup>

Unlike prescription (or statutes of limitations),<sup>[166]</sup> therefore, statutes of repose run irrespectively of any wrong sustained by its holder.<sup>[167]</sup> This explains the reason why statutes of repose may apply not only to claims but also to other sorts of rights, particularly power-rights (see *supra*, ch 10, para 4.2.1).

For example, the period of 14 days within which a consumer can withdraw from a distance or off-premises contract under EU law (see *supra*, ch 10, para 3) is a statute of repose.

Nevertheless, like prescription (or statutes of limitations) (see *supra*, ch 10, para 5.1), in most legal systems statutes of repose are affirmative defenses subject to forfeiture if not asserted promptly.<sup>[168]</sup>

Time periods of statutes of repose tend to be significantly shorter than those of statutes of limitations.

Parties are generally allowed not only to derogate from statutes of repose,<sup>[169]</sup> but also to subject by agreement their mutual rights to a period of repose not provided for by any statutory

provision, on the condition that it does not make their exercise unreasonably difficult.<sup>[170]</sup>

Statutes of repose cannot be tolled, nor can they be interrupted.<sup>[171]</sup> The only way for the rightsholder to eschew the forfeiture of her right, in case the latter is not acknowledged by the counterpart,<sup>[172]</sup> is bringing it before the period of repose has expired. Statutes of repose cannot be waived either.<sup>[173]</sup>

In most cases, statutes of repose are aimed at immunizing the wrongdoer from long-term liability, putting a time bar on potential litigation (nonclaim statutes);<sup>[174]</sup> in doing so, they are frequently combined with prescription of any claim arisen in the meanwhile.<sup>[175]</sup> This statutory

335 combination is frequently provided for with regard to seller liability for defects in property sold, constructor liability for construction defects, and producer liability for defective products.

For example, article 39 CISG stipulates that: '(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period

of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee'. Paragraph 1 provides for a statute of limitations, whereas paragraph 2 provides for a statute of nonclaim, combined with the former.

## Glossary

## Biographies

## CHAPTER 11

### Legal subjects

- Legal personhood and capacity to act
- Natural persons and legal persons
- Incorporated and unincorporated legal persons: the corporate veil
- For-profit and non-profit legal persons
- Companies, partnerships and cooperative societies
- Foundations and associations
- Emerging legal subjects (animals, ‘Mother Earth’, e-persons)

Natural persons are granted legal personhood from birth. Embryos and fetuses can solely hold a number of specific rights (and duties), conferred *ad hoc* to them, and conditionally on their subsequent birth.

Natural persons attain the general capacity to act when they come of age. Minors enjoy (after a certain threshold of infancy) the capacity to enter into some lesser and daily bargains, as well as contracts for labor and services, and for sports or entertainment services. They may gain a wider (albeit still limited) capacity in cases of emancipation (obtaining the authorization to contract marriage or other special circumstances). Conversely, adults may be incapacitated, if they are affected by mental illness or by another pathological factor (like habitual abuse of alcohol or drugs, excessive prodigality, and so on).

In civil law jurisdictions, minors and incapacitated adults are legally represented by their parents or by a guardian, who holds a general (albeit not unlimited) power to act on behalf of the child or ward. Under common law, parents and guardians (or conservators)

do not hold such a general and statutory power to act, unless they are specifically authorized by a court to enter into individual contracts on behalf of the child or ward.

Legal persons can be non-profit (foundations, or corporations sole; associations, or corporations aggregate) or for profit (companies and cooperative societies), acting solely through the agency of their legal representatives (eg managing directors).

<sup>342</sup> Companies may be incorporated (corporations) or unincorporated (partnerships).

Corporations are legal persons that are completely autonomous and whose assets are fully separated from those of their owners; the latter are not liable for the debts owed by the former (corporate veil), with due exceptions (so-called lifting, or piercing, of the corporate veil). Corporations may be either joint-stock/public limited companies (PLC), whose shares can be traded on exchanges (listed companies), or private limited (liability) companies (LLC, or Ltd).

In partnerships, the capacity to manage the business may be held by any of the partners (general partnerships, GP) or solely by some of them (limited partnership, LP). The managing partners are personally and jointly liable for the debts owed by the partnership. Limited liability partnerships (LLP) are a hybrid of partnership and corporation, since partners, albeit responsible for management, enjoy a limited liability.

## 1. Legal personhood

Legal personhood is defined as the capacity to hold rights and duties protected by the law (see *supra*, ch 10). It consists, therefore, in a **legal standing** (or *status*), which is granted by the law to those who are thus recognized as legal subjects.

## 1.1. Natural persons

All people have legal personhood and, therefore, are recognized as legal subjects, simply by virtue of their being human. Particularly, they are categorized as natural persons.

In contrast to the past, when, for example, human beings were divided between ‘masters’ and ‘slaves’, contemporary law has widely acknowledged the constitutional principle of anti-discrimination, which *inter alia* prevents national legislators from depriving some categories of human beings of their legal personhood<sup>[1]</sup> or from limiting it in any way.<sup>[2]</sup>

Slavery was advocated for by Aristotle as being part of natural law (see *supra*, ch 5, para 4).

Persisting in the nineteenth century, slaves were denied having legal personhood in some countries, like the US. See *Lenoir vs Sylvester* (North Carolina, 1830): ‘a legacy cannot be given to a slave; for he can have no right, whatsoever which does so, the instant it is transferred to him, passes to his master. Everything which belongs to him, belongs to his master. In other words, he is in law himself chattels personal; and it would be absurd to say that property can own property’.

Litigation over slavery led in early 1861 to the outbreak of the American

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Civil War,<sup>[3]</sup> which resulted in some of the amendments to the US Constitution (see *supra*, ch 7, para 3.2). The Thirteenth Amendment (1865), in particular, provides that slavery shall not exist within the US or in any place subject to its jurisdiction.

Yet, nationality is generally deemed as grounds for some restrictions of legal personhood, in the sense that **foreign nationals or stateless persons (aliens)** may be not granted the capacity to hold some rights. This happens above all in the domain of public law (see *supra*, ch 7, para 1), particularly with regard to political rights (like the right to vote), which may typically be reserved for **citizens**. Albeit less frequently, this may occur in the domain of private law as well, when aliens may be, for example, denied the capacity to set up a corporation or to acquire ownership of real estate situated within the national territory; however, in contrast, human rights under constitutional command must be granted equally to foreigners (or stateless persons) and to citizens.

In the vast majority of Western legal systems, legal personhood is attained by a human being at birth.<sup>[4]</sup> Therefore, embryos and fetuses, protected and safeguarded as they may be by the law,<sup>[5]</sup> are not considered natural persons by definition, since they are not (yet) born.<sup>[6]</sup>

explicitly set forth that ‘[t]he existence of a human person begins with her conception’ (article 19(2) *Código civil y comercial de la Nación Argentina*). If so, embryos and fetuses are to be classified as legal subjects (article 1(2) *Código civil* of Perú), albeit devoid of the capacity to act (see *infra*, ch 11, para 2).

Equating birth and the start human personhood provides the basis of the constitutional legitimacy of abortion:<sup>[7]</sup> when embryos and fetuses are put on the same footing with those who have already been born, abortion amounts to homicide and, therefore, cannot be legalized without infringing the principle of equal treatment.

In order to legalize abortion as a private right of a pregnant woman, conversely, a famous sentence of the Supreme Courts of the United States stated that: ‘the word “person” as used in the Fourteenth Amendment of the United States Constitution does not include the unborn’ (*Roe v Wade* case of 1973).<sup>[8]</sup>

More generally, a woman is under no duty to guarantee the mental and physical health of a child at birth and thus cannot be compelled to do or not do anything merely for the benefit of an unborn child.<sup>[9]</sup>

Although not being natural persons, embryos and fetuses are nonetheless conferred *ad hoc* a number

of rights (and duties), particularly some personality rights (like that to health), as well as heirship and rights conferred through donations (or contracts for their benefit) [10] (see *supra*, ch 10, para 4). However, these rights may be dependent on the subsequent birth of the child. [11]

Medical practices that harm an embryo or a fetus oblige the negligent doctors to compensate the resulting damages. If during gestation doctors fail to inform the parents that their embryo or fetus is congenitally abnormal, the negligent doctors may be held liable for the higher expenses that the parents will have to cover to rear their child, as well as for their moral damages (*wrongful birth*). [12] In most jurisdictions, on the contrary, no moral damages are awarded to a new-born because of her congenital abnormality (*wrongful life*), since it was not caused by the doctor's negligence. [13]

When natural persons die, their legal personhood is extinguished. Most of their (patrimonial) rights (eg property) and duties (eg debts) pass, except some which terminate (eg alimonies, rights of personality) (see *supra*, ch 10, para 4).

## 1.2. Legal persons

Legal persons are **organizations** set up to undertake an activity either for profit or for non-profit. [14] They may be established and ruled under public law (eg the state) or under private law (eg a club). [15]

For-profit legal persons aim to earn a profit and to distribute it to their owners (dividends); by contrast, non-profit legal persons are established to pursue a common purpose of a different nature, be it the pursuit of personal pleasure or advantage of their owners or founders (eg in the field of sport, culture, leisure, etc) or some outside purpose (charitable or not). [16]

Consequently, non-profit legal persons are prohibited from distributing any gain to their owners or founders, and they enjoy some exemption from taxation.

Both for-profit and non-profit legal persons under private law may be incorporated or unincorporated legal entities.

**Corporations** are legal entities that are completely separated from the persons who established them and have property and organizations on their own. This eventually led most jurisdictions worldwide (including those of the US, EU, and UK) to allow them to be set up even by one individual.

Perfect asset partitioning between a corporation

and its owner(s) creates a shield (veil) in favor of the latter and against third-party claims towards the former, and vice versa. Be it one or many, consequently, the owners of a corporation are personally not liable for the debts owed by the latter.

In a cornerstone case of English common law, the sole proprietor of a boot-making business, named Salomon, transferred the business to a company, named Salomon Ltd, which he himself had established together with six other members of his family; instead of being paid with money in consideration of this transfer of his property, he was conferred with shares and debentures having a floating charge on the assets of the company. When the company's business failed and it went into liquidation, Salomon's right of recovery, although being secured on the assets of the company, was not honored by the liquidator, who alleged that the other six signatories of the memorandum were mere 'dummies' and that the company was just Salomon in another form, an alias, or at most his agent. He therefore contended that Salomon himself should have been made responsible for the company's debts. Having Salomon sued, his claim was dismissed both by the High Court and the Court of Appeal; the latter's

ruling, however, was reversed by the House of Lords, which unanimously proclaimed that ‘[t]he company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act’ (*Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22).

Under exceptional circumstances, however, that shield is disregarded by the law, and the shareholders are personally and unlimitedly liable for the debts owed by the corporation (so-called

346 **lifting, or piercing, of the corporate veil**). This may happen, for example, where the corporate entity is a fraud or a sham (façade), or because the shareholders’ actions have deleterious effects on the survival of the corporation. [17]

Corporations are mostly registered and regulated at least by one (board of directors) or even two legal bodies (management board and supervisory board) (see *infra*, ch 11, para 1.2.1). Therefore, they are encumbered with start-up and annual costs of a certain amount, as well as with administrative

burdens that are rather invasive.

By contrast, unincorporated legal entities consist of a collection of individuals that, to some extent, share property and organization. Consequently, all or some of the owners of an unincorporated legal entity are personally and unlimitedly liable for the debts owed by the latter. In contrast to corporations, unincorporated legal entities are not registered and not necessarily regulated by a legal body. Therefore, start-up and annual costs sustained by their owner(s) are relatively low, and they do not incur administrative burdens.

It has been traditionally held that acts undertaken on behalf of a legal person but outside the objects spelled out in its memorandum of association (or an akin constitutive document) (so-called *ultra vires* acts) are void and cannot be ratified by the directors or the members of that legal person, not even unanimously. As far as corporations are concerned, however, that doctrine has been generally abandoned, or at least mitigated, since it proved excessively harsh towards third parties and thus discouraged them from entering into negotiations with a corporation: in the EU, UK and US, acts undertaken *ultra vires* by corporations are generally not affected by invalidity on that ground; yet, if the authority to undertake such acts is lacking on the part of the person that purports to act on behalf of a corporation, they may be devoid of legal effects, particularly if the third party has acted in bad faith (see *infra*, ch 11,

para 2.2).

Furthermore, different jurisdictions are prone to restrict variously the legal personhood of legal entities with regard to their **capacity to take** under a will.<sup>[18]</sup>

#### 1.2.1. For-profit organizations

Legal persons for profit are called companies, if they are incorporated, and partnerships, if they are unincorporated. They are regulated by **company and partnership law** (or **corporate law** in the US), which is a special branch of commercial law (see *supra*, ch 7, para 2).

Within the EU, the key issues of Member States' company law have been intensively harmonized by thirteen directives (see *supra*, ch 8, para 1.5.2), some of them having over time been repealed, replaced, or amended. Furthermore, the EU enacted a number of regulations aimed at creating and governing some EU companies that coexist with national rules (see *supra*, ch 8, para 1.5.2).

In the UK, company law is overall regulated by the Companies Act 2006.

In the US, federal law provides solely for some minimum standards for trade in company shares and governance rights, whereas the rest of company law is stipulated by each state and

territory, which has its own corporate code.<sup>[19]</sup> It is the State of Delaware that has by far succeeded in the regulatory competition thus raised, having been able to attract the majority of the largest US corporations; its judge-made law is therefore particularly influential and may be said to be paramount also for scholars of company law.

#### 1.2.1.1. Companies

Companies are either joint-stock companies/public limited companies (PLC) or private limited liability companies (LLC, or Ltd).  
<sup>[20]</sup>

The **memorandum (of association)** (if required) and the **articles of association** form the key constitutional documents of a company; *inter alia*, they spell out the name, the purpose, and the capital of the entity. The **bylaws** generally define the internal structure of a company and regulate the functions and decision-making processes of its legal bodies.

**Joint-stock companies/public limited companies (PLC)** generally suit the needs of mid-size or large enterprises.<sup>[21]</sup> Their ownership is subdivided into shares that are fully transferable and freely tradable on stock exchanges,<sup>[22]</sup> subject to corporate charter or statutory restrictions.

Despite some traces of PLCs dating back to antiquity, their prototype is

generally acknowledged in two large trading companies founded in the early modern period, ie the English East India Company (Charter of 31 December 1600) and the Dutch *Vereenigde Oost-Indische Compagnie* (Octroy of 20 March 1602).

PLCs whose shares are quoted on a stock exchange, and therefore publicly traded, are called **listed companies**.

Listed companies are regulated not only by company law, which falls under private law, but also by **capital markets law**, which is cross-sectional, encompassing public as well as private law (see *supra*, ch 7, para 1).<sup>[23]</sup> The building blocks of capital markets law include stock exchanges law, regulation of insider trading (or insider dealing) and market manipulation, and takeover law. **Insider trading** (or **insider dealing**) is the buying and selling of financial instruments by board members (and other persons) who make use of their privileged access to information relating to the company.<sup>[24]</sup> **Takeovers** are the transfer of control of a company.<sup>[25]</sup>

The continental model (also followed by the EU) traditionally requires a **statutory minimum capital**, even if more recent developments of national company law of most countries tend to

mitigate that requirement. By contrast, the English system does not require a statutory minimum capital but relies on **solvency tests** and enforcement mechanisms for wrongful trading when facing insolvency.<sup>[26]</sup>

Under EU law, a Member State is not allowed ‘to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital’ (**case Centros** of 1999; [27] on this case, see also *supra*, ch 8, para 1.5.1; ch 10, para 4.3).

The structure of PLCs is regulated through mandatory rules that leave little room for intrafirm contractual freedom and is based on a rigid separation between ownership (the **shareholders**) and management/control (the **directors**).

This feature engenders the so-called **principal-agent conflict**, since the shareholders (principals)

may lose control of the corporation to its management and the directors (agents) may aim to maximize their own gain instead of acting in the best interest of the shareholders. The potential shortcomings of this model must be remedied through proper rules of **corporate governance**.

A pivotal (and illustrious) contribution with regard to the role played by the separation between ownership and management of corporations for the development and the governance of big corporations is that by Berle and Means, *The Modern Corporation and Private Property*, whose first edition dates to 1932. [28]

The core of the principal-agent conflict had already been well described by Adam Smith in 1776: ‘The directors of such companies [...], being the managers rather of other people’s money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own [...]. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company’. [29]

There are two basic models of internal governance for corporations in legal systems. The

dualistic (or two-tier board system) is based upon the co-existence of a management board, which is responsible for the management of the corporation, and a supervisory board, which is responsible for its control. This system originated in Germany, but it is widespread in other countries of continental Europe: in some of them, the shareholders' meeting appoints the supervisory board, which in turn appoints the management board; in others, like in Italy, it is also possible to opt for a so-called 'traditional' system, where both the supervisory board and the management board are appointed by the shareholders' meeting. By contrast, the monistic (or one-tier board system) is dominant in Anglo-American jurisdictions: both management and control are placed in the hands of the board of directors, inside which, however, there is a distinction between executive and non-executive (often independent) directors.<sup>[30]</sup>

Private limited (liability) companies (LLC, or Ltd) generally suit the needs of family-owned enterprises, or at any rate closely held firms that have only a handful of shareholders.<sup>[31]</sup> Although transferable, in fact, shares of LLCs are not tradable on stock exchanges; importantly as well, the implementation of direct shareholder management is allowed, and the form provides for broad intrafirm contractual freedom.<sup>[32]</sup>

#### 1.2.1.2. Partnerships

Partnerships are either general partnerships (GP), limited partnerships (LP), or limited liability partnerships (LLP). [33]

Unless otherwise agreed in the partnership agreement, each member of a **general partnership** (GP) has the capacity to manage the partnership business; for the very same reason, each partner has joint and several liability for the debts owed by the partnership. Some legal systems impose a duty not to compete on each partner; however, the soft regulatory approach adopted by most legal systems means the majority of duties owed by the partners have been shaped through judge-made law or private contracting and practitioners' expertise. [34]

350 The peculiarity of **limited partnerships** (LP) is that some of the partners are general, others are limited. General partners have exclusive decision-making power and are the sole representative of an LLP; for the very same reason, they are personally and unlimitedly liable for the debts of that legal person. By contrast, the liability of limited partners, who are devoid of any power to make decisions or represent the LLP, is restricted to the amount contributed under the limited partnership agreement. [35] The LP is the vehicle of choice for private equity, hedge funds and investment funds. [36]

By contrast, the partners of a **limited liability partnership** (LLP) are not personally and jointly liable for the debts owed by the partnership,

although they are involved in the management. The LLP is the vehicle of choice for professional services firms (eg law or accounting firms). [37]

#### 1.2.1.3. Cooperative societies and other self-help organizations

From the end of the eighteenth century, various forms of self-help organizations began to be developed, which were meant to meet the needs of the working class through the mechanisms of mutuality. The goods and services they provide to (some of) their members are funded primarily (if not exclusively) out of the pool of their members' subscriptions. Noteworthy among them are: 1. friendly societies, ie mutual insurance associations providing their members with benefits in the event of sickness, death or bereavement; 2. building societies, which raise money in order to allow their borrowing members build or buy a house; 3. industrial and provident societies, which engage in commercial and industrial activity for their members' mutual benefit or for that of the wider community.

All these entities were generally established as unincorporated associations, but over time they were entitled to register and thus incorporate.

#### 1.2.2. Non-profit organizations

Non-profit organizations are either foundations or associations.

**Foundations** are corporations sole. They consist of a single incorporated office (eg the Crown in the UK).

**Associations** are corporations aggregate. They consist of a group of members, or **civil partnership** (eg a scientific society).

In some legal systems, associations may also be unincorporated entities, and this applies (albeit rarely) to foundations as well. If that is the case, such entities remain generally unregistered and are not always regarded by national laws as holding the status of legal persons. Hence, they may lack the capacity to hold property; furthermore, some of their founders or members may be held personally liable for the debts owed by the entity.

<sup>351</sup> The members of an unincorporated association enjoy a wider freedom than those of an incorporated one, since statutes only minimally regulate their mutual rights, which are governed almost exclusively by the terms of each association; conversely, artificial personality may be perceived as limitation on the associates' freedom, since it involves more regulation and supervision by the public administration (see *supra, ch 10, para 1*). This reason explains why trade unions and political parties historically refrained from seeking any artificial personality, which could prospectively endanger their autonomy as social and political actors; nonetheless, special pieces of legislation may

provide for a registration of trade unions, which may thus gain the status of quasi-corporations.

[38]

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### 1.3. Emerging legal subjects

The traditional understanding of legal personhood has been increasingly challenged by new demands for protection of the environment (animals, wildness), as well as by liability issues raised by the advancement of technology (robots, systems of artificial intelligence). Tremendously affected is thus the societal view of (1) what is a being, which has her own rights, and (2) what is an object, which, be it inert or somehow animated, is possibly owned by someone. Hence, under law the division between subjects and non-subjects tends to be less neat than in the past and is styled more like a continuum between the extremes of men, on one side, and things, on the other. [39]

According to the tradition of Roman law, in most legal systems, including those of common law, [40] animals are considered as things that can be objects of property rights (eg ownership), rather than subjects able to hold rights. However, modern laws seek to provide a special protection for animals, [41] and these laws, albeit to a lesser extent, differentiate them from inanimate natural objects; it has been even urged to grant human rights to great apes. [42]

Under German law since 1990, '[a]nimals are not things. They are protected by special statutes. They are governed by the provisions

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which apply to things, with the necessary modifications, except insofar as otherwise provided' (§ 90a BGB). [43]

Under French law since 2015, '[a]nimals are living beings that are endowed with sensitivity. Unless differently set forth by the statutes aimed at animals' protection, the law of things applies to them'. [44]

Peter Singer, moving from a utilitarian (not moral) understanding of rights, claims that their entitlement should be based on the principle of minimizing suffering. Assuming that some animals prove capable of feeling pain and, conversely, some human beings do not, he condemns discrimination grounded on the belonging to human or animal species (speciesism). Notwithstanding some important differences, animals capable of feeling pain should be vested with rights like the human beings (and consequently a vegetarian or vegan diet should be followed, vivisection should be banned, and so on). [45]

In an increasing number of legal systems worldwide, particularly (but not exclusively) in Latin America, [46] some constitutional charters, statutory provisions, and court rulings acknowledge the rights of 'Mother Earth', a development that was eventually supported by

the United Nations.<sup>[47]</sup>

Most notable is the pathbreaking article 10 of the 2008 Constitution of Ecuador,<sup>[48]</sup> pursuant to which ‘nature is to be held as a legal subject holding the rights bestowed on it through this Charter’.<sup>[49]</sup>

On a different note, the development of new technologies, particularly in the field of artificial intelligence, poses the question of whether **robots and other autonomous systems** (like unmanned cars) (see *supra*, ch 1, para 4) should be prospectively granted legal personhood, as they are potentially going to take autonomous decisions that can imply also a liability towards others.<sup>[50]</sup>

Particularly, a resolution issued by the European Parliament in 2017 envisioned creating ‘a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of **electronic persons** responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently’ (emphasis added).

<sup>[51]</sup>

## 2. Capacity to act

The capacity to act consists in the power to accomplish legal acts affecting one's own rights and duties (see *supra*, ch 10, para 4; ch 9, para 2).

The capacity to act is required for the accomplishment of **legal transactions** (see *supra*, ch 9, paras 2-5). For **contracts**, **wills**, and **marriage**, in particular, the requirements for capacity to act may be different, so that one can talk of a contractual capacity, a testamentary capacity, and a marriage capacity. When a natural person is devoid of legal capacity, statutory provisions or a court's decision can vest a third party with the power to enter into most contracts on behalf and in the best interest of that person (**legal agency**) (see also *supra*, ch 10, para 3; *infra*, ch 11, paras 2.1 and 2.2).

By contrast, **torts** do not require the tortfeasor's capacity to act, as the tortfeasor's duty to compensate the loss sustained by the damaged party does not depend upon a decision taken consciously and voluntarily by her. [52]

Nonetheless, legal systems tend to exonerate minors from civil liability, if they have committed a tort before reaching a certain age, [53] and, to a lesser extent, the same applies to mentally incapacitated persons unable to make rational judgments. [54]

In jurisdictions of civil law, parents,

or other responsible parties incur a strict or aggravated liability for torts committed by children.

In the UK, by contrast, no specific rule on parental liability is provided for; any claim of the kind must be based upon the tort of negligence.

[55] The same applies to the US common law, but a limited parental responsibility for some torts of minor children is now imposed by statute in most States. [56]

Similar considerations apply to the supervisors of adults that are mentally incapacitated. [57]

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If a minor gains an unjustified enrichment at someone else's expenses (eg the former is paid by the latter for goods that are subsequently not delivered), she owes restitution for that benefit only to the extent that it has remained in her hands. [58]

Under English law, article 3(1)(b) of the 1987 Minors' Contracts Act stipulates that where 'the contract is unenforceable against the defendant (or he repudiates it) because he was a minor when the contract was made, the court may, if it is just and equitable to do so, require the defendant to transfer to the plaintiff any property acquired by the defendant under the contract, or any property representing it'. This order cannot be made once the minor has dissipated the property obtained or

its proceeds.<sup>[59]</sup> Outside the scope of such statutory provision, common law grants restitution in a case of fraud committed by the minor, but under the same condition just set out.<sup>[60]</sup>

## 2.1. Natural persons

All people are granted legal personhood when they are born, but they attain their capacity to act only after reaching a certain age (**age of majority**), [61] which legal systems generally set out between 18 and 21 years. The rationale of this rule is that people under this age (**minors**) are deemed by law as lacking the sound judgment needed to take a legally binding decision about their own patrimonial and non-patrimonial interests; accordingly, consent is required of those who hold **parental responsibility** over the minor herself, ie her parents or, if there are none, a guardian appointed by the court (see *infra*, this para). [62] Nonetheless, it is generally allowed that, where minors have achieved sufficient discernment and intelligence to understand fully a **medical treatment**, they can choose to undergo it with or without their parents' consent, this rule being referred to in common law jurisdictions as 'Gillick competence'.

In the Gillick case, a Roman Catholic activist, named Victoria Gillick, who then had four daughters under the age of 16, challenged a Memorandum of Guidance issued in May 1974 by the UK's Department of Health and Social Security, according to which contraceptive advice and treatment might be given to a girl under 16 without her parents' consent,

provided that doctors had failed to persuade her to involve her parents (or guardian). The plaintiff's action was eventually dismissed by the House of Lords,<sup>[63]</sup> which thus spelled out the above-mentioned ruling.

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Conversely, most legal systems set out that a court order may deny adults' capacity to act or diminish it (**incapacitation**), when such adults are affected by an impairment or insufficiency of their personal faculties that endangers their own interests (and possibly those of other members of their own family as well), should they perform an ill-advised legal act. As a general rule, a legal act performed by a minor, as well as by an incapacitated adult is **invalid** (see *supra*, ch 9, para 5), unless otherwise settled by the law.

In civil law jurisdictions, most contracts can be entered into by a **legal representative** of a minor or an incapacitated adult, who acts like a statutory proxy or agent of the latter (see *supra*, ch 10, para 3). The legal representatives of a minor are her **parents**: the consent of one of them suffices for acts of ordinary administration on behalf of the minor, whereas for acts of extraordinary administration the consent of both parents is required (and in some cases it must be supplemented by a judicial authorization). When parents are missing or unable to take on their parental responsibility, the legal representative of the minor is her **guardian**, who is appointed by a

court and, in her capacity, can enter into a contract on behalf of her ward. The same applies to the guardian that can be appointed by a court to an incapacitated adult.

In common law jurisdictions, by contrast, the parents and the guardians (or **conservators**) cannot act as legal representatives for a person who lacks contractual capacity (or **conservatee**), [64] unless they do so under the direction of a court. [65]

#### 2.1.1. Minors

In the case of contracts, it is generally provided that they are null and void when entered into by an **infant**. The threshold of infancy may be drawn by a legal system either by fixing a certain age (of 7 years, in most cases) (Germany, Austria) or by mandating courts to ascertain that the ability of a contracting party to make a rational judgment is lacking due to her infancy and with respect to that specific contract (Switzerland). Some legal systems, however, refrain from declaring contracts void that, although entered into by an infant, are common for persons of her age (Austria, Poland, and Scotland).

When a minor steps beyond the threshold of infancy, some legal systems set forth special requirements under which contracts entered into by her are deemed valid; to that extent, some legal systems refer to a **limited contractual capacity** (Germany: § 106 BGB; but not in France or Italy).

The requirements to be met to that end may vary depending on whether the minor has already reached a certain age (14 years, in most cases), which is considered an intermediate stage between infancy and majority (Austria, Greece, Poland, and Scotland). Some of the most common special requirements of the kind are that: 1. The contract relates to necessities (UK and US);<sup>[66]</sup> 2.

- 356 The contract is with regard to an act of ordinary administration and is reasonable in its terms (France); 3. The contract would be entered into by an adult exercising reasonable prudence; 4. The contract provides the minor with a solely juridical advantage (Germany); 5. The contract serves to protect the minor's estate; 6. The minor will perform her side of the bargain with means that were given to her for her free disposal (Germany).

[67]

English common law is reflected in section 3(2) Sales of Goods Act 1979, according to which 'where necessaries are sold and delivered to a minor [...], he must pay a reasonable price for them'.<sup>[68]</sup>

Under German law, a juridical act of a person that lacks the capacity to act does not need her legal representative's consent, insofar as it brings solely a juridical advantage (§ 107 BGB). Furthermore, a minor's contract is valid, if she can perform her part of it with means provided specially or generally by her legal representative or by some third

party with the representative's consent (§ 110 BGB, so-called 'pocket money paragraph').<sup>[69]</sup>

Article 1148 *Code civil* stipulates that all persons lacking the capacity to act can nonetheless perform the ordinary acts authorized by the law or according to usage, provided that their terms are reasonable.<sup>[70]</sup>

Furthermore, article 1151(1) *Code civil* stipulates that the acts of ordinary administration undertaken by a minor may be avoided if they amount to an economic disadvantage.<sup>[71]</sup>

If contracts entered into by a minor do not meet these requirements, then they are subject to **invalidity**. In some systems, such contracts are affected by nullity (or being void), either relative (France) or absolute; in others, they are voidable (US,<sup>[72]</sup> Italy). Under German law, contracts entered into by a minor are 'temporarily ineffective'. Under English law, contracts entered into by a minor are avoidable only in four cases, namely contracts concerning land, subscription for shares in companies, partnerships, and marriage settlements;<sup>[73]</sup> outside these four cases, contracts entered into by a minor become 'limping' contracts, in the sense that they bind only the other contracting party and not the minor herself,<sup>[74]</sup> unless the latter ratifies them after becoming of age.<sup>[75]</sup>

contract is concluded by a minor without her legal representative's authorization, then the legal effects of that contract depend upon her legal representative's ratification.

Pursuant to article 1147 *Code civil*, the lack of capacity to act is grounds for relative nullity.

Article 1425(1) *Codice civile* provides that a contract is voidable when one of the parties lacked contractual capacity.<sup>[76]</sup>

A limited contractual capacity (called **emancipation**) can be obtained by a minor to be judicially authorized to contract marriage (Spain, Poland, Turkey, France, Italy, Greece, and the Netherlands). In some legal systems, other factors may trigger emancipation of a minor as well (like enlistment in military service). Less frequently, emancipation may be declared by a court order on a case-by-case basis.<sup>[77]</sup>

Furthermore, a **special contractual capacity** may be acknowledged for specific types of contracts, most typically those for labor and services,<sup>[78]</sup> as well as for sports or entertainment services.<sup>[79]</sup>

Under English law, a minor is bound by a contract of employment that is on the whole beneficial to her, even if it contains some disadvantageous terms (unless harsh and oppressive).  
<sup>[80]</sup>

## 2.1.2. Incapacitated adults

Incapacitation of adults has traditionally been provided for cases of mental illness, as well as for pathological or abnormal behavior (because of habitual abuse of alcohol or drugs, excessive wastefulness, etc.). It must generally be declared through a judicial decree, and may be either **complete or partial**, depending on the seriousness of the pathology (see also *supra*, ch 11, para 2.1).

Complete incapacitation tends to be treated similarly to incapacity of minors, and partial incapacitation like limited capacity of the latter.

[81] In general terms, therefore, contracts entered into by an incapacitated adult are as invalid as those entered into by a minor. In common law jurisdictions, however, contracts entered into with an adult devoid of mental capacity are generally valid, unless the incapacity was known to the other contracting party: in that case, the contract is voidable. [82]

Furthermore, if the property of an adult devoid of mental capacity is subject to the control of the court and she attempts to dispose of such property, it becomes a 'limping' contract (*negotium claudicans*), in the sense that it binds only the other contracting party and not the incapacitated person herself.

[83]

As with contracts entered into by a minor, legal systems also tend to set forth some special

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requirements under which contracts entered into by an incapacitated adult are deemed valid. Some of the most common special requirements of the kind are that: 1. The contract relates to necessities (UK and US); [84] 2. The contract relates to matters of daily life (Germany); 3. The contract provides the minor with a solely juridical advantage (Germany); 4. The contract deals with an act of ordinary administration and is reasonable in its terms (France).

Article 1148 *Code civil* stipulates that all persons devoid of the capacity to act can nonetheless perform only ordinary acts authorized by the law or according to usage, provided that their terms are reasonable. [85]

Under German law, the contract entered into by an incapacitated adult is valid, insofar as it relates to matters of daily life, and does not involve large amounts (§ 105a BGB).  
[86]

However, the general trend is that incapacities are becoming an old-fashioned notion, which is disappearing insofar as it eventually points to a gross limitation of private autonomy of those involved, particularly people with disabilities, and may even result in a discrimination against them.  
[87]

Pursuant to article 12(3) of the United Nations Convention on the Rights of Persons with Disabilities,

adopted on 13 December 2006 and ratified by the EU,<sup>[88]</sup> states must ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacities’. Pursuant to article 12(4), states must ensure that ‘measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interests and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body’.

[89] Even if the matter is not covered by the ECHR, the jurisprudence of the ECtHR has on several occasions stressed that safeguarding the personal autonomy and ensuring the social inclusion of adults with disabilities is crucial to the realization of the fundamental rights that the ECHR is meant to protect.<sup>[90]</sup>

As an alternative, new instruments for administering a weaker party’s affairs have been provided by most legal systems, such as *Betreuung* in Germany, *sauvegarde de justice* in France, and *amministrazione di sostegno* in Italy. Individuals who are in need of legal aid to look after their interests

are thus not deprived of their capacity to act but are supported and counseled by an administrator of their affairs, whose powers may be effectively tailored to the needs of the beneficiary.

The contracts entered into by a *Betreute* are valid insofar as they relate to daily matters (§ 1903(3)(2) BGB) or they bring to her solely a juridical advantage (§ 1903(3)(1) BGB).

In cross-border matters, PIL issues have been addressed by the 2000 Hague Convention on the International Protection of Adults.<sup>[91]</sup> *Inter alia*, this instrument deals with questions relating to powers of representation that are granted in advance by adults prior to the onset of their incapacity and designed either to survive such incapacity or to take effect upon it (private mandates). More recently, in March 2020, a set of Model Rules on the Protection of Adults in International Situations was approved by the ELI;<sup>[92]</sup> it calls for the issue of a legislative measure by the EU based upon article 81 TFEU.<sup>[93]</sup>

A legal transaction performed by a party that (although not being adjudicated as disable) is temporarily out of her senses due to drunkenness, drugs, insanity, etc. can be avoided or repudiated by that party, provided that some strict conditions are met. In some jurisdictions, it is required (by judge-made law) that the disorder is so serious

that it fully negates the ability to form contractual will (Germany, France); [94] others require that the counterparty acted dishonestly, ie she was put on notice or was given reason to suspect the other party's incompetence, such as would indicate to a reasonably prudent person that an inquiry should be made into the party's mental condition (Italy, UK, US). [95]

§ 105(2) BGB stipulates that a legal act performed by a person who is out of senses or otherwise disturbed is void. [96]

Pursuant to article 414-1 *Code civil*, a legal act is valid when the person who performed it was sane; otherwise, it is void, but the burden of the proof lies with the party pleading to have the act avoided. [97]

Article 428 *Codice civile* sets forth that the legal acts performed by a person devoid of discernment are voidable, provided that the other party may be deemed to have been acting in bad faith, taking the disadvantage actually or potentially sustained by the incapacitated party into consideration as well as the characteristics of the contract entered into. [98] A similar ruling is settled in common law. [99]

Adults may also be hit by punitive incapacities. Convictions for committing a serious crime can automatically include a **legal disability** (**disqualification**) for the duration of a sentence

(forfeiture of offices, etc.). In those cases, the capacity to get married and to make a will is generally retained by the offenders.

361 **Testamentary capacity** is generally attained at the age of 18 years. In some systems it is also attained by minors that obtain a judicial authorization to contract marriage. [100]

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## 2.2. Legal persons

By its nature, a legal entity, being fictitious, can only act through the agency of natural persons (**legal representatives**) (see *supra*, ch 10, para 3).

Legal representatives of a corporation are its managing director(s), whilst those of a partnership are the partners (all or a selected few) themselves.

Under company law, a third party can rely on the legal representatives' statutory authority, since the latter cannot be affected by any 'internal' limitation (albeit enshrined in the bylaws of the corporation), unless a third party was acting in bad faith, ie knew of the limitation or was

<sup>362</sup> unaware of it through carelessness.<sup>[101]</sup>

**Glossary**

**Biographies**